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OF

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IN THE

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OF

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JUDGES
OF
THE SUPREME COURT.

HON. JOHN T. LUDELING, CHIEF JUSTICE.

HON. J. G. TALIAFERRO,	}	ASSOCIATE JUSTICES.
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. J. H. KENNARD.*		

A. P. FIELD, ATTORNEY GENERAL.

* **HON P. H. MORGAN** succeeded **MR. JUSTICE KENNARD** on the first of February.

DECISIONS OF THE SUPREME COURT.

PREScribed MODE OF REPORTING.

SECTION 3222—Revised Statutes. All cases in which any judgment shall be pronounced shall be reported, except such as present only questions of fact, or in which damages may be allowed, as for a frivolous appeal. But the reporter shall, at his discretion, report the several cases more or less at large, according to their relative importance, so as not to increase unnecessarily the size of the volume.

The report of each case shall contain :

First—The title of the case.

Second—The name of the judge and court from which the appeal was taken, and if tried by a jury, the fact shall be stated.

Third—The names of counsel.

Fourth—Concise notes at the head or in the margin of each case, of the points decided.

Fifth—A statement of the facts of each case taken from the record, when necessary to explain the decision of the court. Mention shall also be made of application for a rehearing when important to a proper understanding of the decision.

Each volume shall contain a list of all the cases reported, arranged alphabetically in the names of the plaintiffs and defendants, and a list of all cases determined within the period embraced by the volume, but not reported, together with a copious index.

ERRATA.

This article does give to the party claiming, etc., instead of does not, page 307.

790, for 900, page 377.

Vendee, for vendor, in syllabus, page 431.

Collation, for colation, in syllabus, page 183.

3227, for 3237, page 82.

Where, for here, page 141, syllabus.

Individually, for individuality, page 222, syllabus.

District court, for this court, page 609.

In, for on, page 305.

OMISSION.

For the dissenting opinion of Justice Wyly in the case of the State *v. Zack McFarland*, see page 671.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NEW ORLEANS.

JANUARY, 1873.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. J. H. KENNARD,*

HON. P. H. MORGAN.

Associate Justices.

A. P. FIELD *Attorney General.*

No. 2527.

CINCINNATI INSURANCE COMPANY v. WILLIAM C. HARRISON et als.

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The provisions of the Code of Practice relating to oyer do not apply to a document filed in a cause in court.

The loss of an appeal bond being established, secondary evidence, either written or oral, may be introduced to prove the alleged signature of the defendant to the bond as surety.

APPEAL from the Sixth District Court, Parish of Orleans. *Cooley, J. L. Madison Day and Bentinck Egan*, for defendant and appellant. *Hornor & Benedict*, for plaintiff and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly.

TALIAFERRO, J. The plaintiffs having obtained judgment against the defendant, Harrison, for \$590 60 with interest, the latter appealed. About eighteen months afterwards, and after an execution had issued on the judgment and been returned not satisfied, the plaintiff sued J. S. Symonds as surety on the appeal bond. This defendant excepted to the proceeding and prayed oyer of the bond sued upon. His excep-

*HON. P. H. MORGAN succeeded MR. JUSTICE KENNARD on the first of February.

tion was overruled, and he answered by general denial. Judgment was rendered against Symonds, as surety on the appeal bond, for the same sum that judgment had been given against the defendant Harrison.

The surety has appealed.

Two bills of exception are presented in the record. The first is as to the refusal of the judge to grant his prayer for oyer of the bond, which it appears was missing and could not be found at the time of trial. The reason assigned by the judge for this refusal is that the provisions of the Code of Practice relating to oyer do not apply to a document which had been filed in a cause in court. We think the ruling correct, and for the reasons assigned by the judge *a quo*. The second bill of exceptions is to the admission in evidence in the court below of the record in this case from the Supreme Court, to show the liability of Symonds as surety on the appeal bond, the original bond being lost. The objection was, that the proceeding by rule taken by plaintiff to render Symonds, defendant, liable as surety was not a suit on a lost instrument; the record was not competent evidence to prove that Symonds signed the appeal bond as surety. We think the ruling correct. The loss of the bond being established, secondary evidence, either written or oral, might be resorted to to establish the alleged signature of the defendant to the bond as surety. We think the whole evidence together, a part of which consists of the testimony of the defendant's attorney, abundantly establishes the signature of Symonds to the appeal bond as surety, and we are satisfied that the judgment of the lower court is correct.

Judgment affirmed.

No. 4476.

STATE OF LOUISIANA ex rel. ATTORNEY GENERAL and on the information of the Returning Officers of Election v. JACK WHARTON et als.
A. P. FIELD, Intervenor.

Where on the third of December, 1872, judgment was rendered by the Eighth District Court, parish of Orleans, dissolving the injunction granted by that court, and dismissing the suit, and said judgment was not signed until the second of January, 1873, after the case was transferred to the Superior District Court recently created, and where on appeal a motion was made to dismiss the same on the ground that the judgment rendered did not require signature, and no appeal could therefore be taken after the lapse of ten days from its rendition;

Held—That the judgment dissolving the injunction and dismissing the suit was a final one, and no appeal could be taken from it until it was signed, which was on the second of January, 1873, and that the appeal was properly made returnable within ten days from that date.

The law creating the Superior District Court authorized the judge thereof to do, in the cases transferred to it from the Eighth District Court which was abolished, what the judge of the latter could have done.

Whether the appointment of either of said judges by the Governor was unconstitutional and void can not be determined in such a collateral manner as on a motion to dismiss.

State ex rel. Attorney General v. Wharton et als.

Where the appointment of the judge was expressly authorized by the statute creating the court, as in the case of an original vacancy, whether this might or might not be sustained as constitutional, in a proper proceeding, is a question not to be settled in this case in which the judge is manifestly an officer *de facto* at least; and his acts must be recognized just as those of an officer *de jure*, until, upon a regular trial, he is disclosed not to be an officer.

Where the affidavit of the appellant declares that, as a member of the State Election Returning Board, his pecuniary interest in the suit exceeds one thousand dollars, and where a reference to act No. 72 of 1871, p. 162, shows that an appropriation was made for the compensation of the same returning officers;

Held—That this mode of establishing an appealable interest under such circumstances is fully sanctioned by our jurisprudence.

The object of the limitation in the constitution to the jurisdiction of the Supreme Court is simply to exclude from it such controversies as are of minor importance.

Where the interest of the State and of the people of the State in the correctness of the ruling of the judge *a quo* is of such magnitude as in this case, the court will not, on a bald technicality, refuse to entertain jurisdiction of the cause, even if there were no pecuniary interest shown, which, however, is not the case in this suit.

Where the matter in dispute involved in the suit is such as to demand or authorize the action of this court, the right to appeal is granted by article 571 C. P. to third persons who allege that they are aggrieved by the judgment rendered in a suit between other parties. The law does not say that such judgment shall be *res judicata* against the third persons to entitle them to appeal.

The appeal must be sustained where, as in this case, the appellant has made the requisite allegations supported by his affidavit and has made it apparent that he is aggrieved by the judgment appealed from, which annuls the authority by which he was declared to be elected Attorney General of the State, whose salary is five thousand dollars per annum, and sets aside the return of the election board which is the foundation of his title to office.

Where it was alleged that appellant had no interest to appeal on the ground that the Returning Board had exercised its authority on his behalf and was *functus officio*;

Held—That appellant had an interest to have it decreed that the Board of Returning Officers was legal at the time it declared his election.

The objection that full ten days was not allowed in this case to bring up this appeal is without force. The law directs that in such cases the appeal shall be returnable within ten days after the judgment of the lower court. The return day may be less, but not more than ten days.

It was immaterial at whose instance the judgment was signed. The law requires the judge to sign all definitive judgments.

Where it was contended that a membership of the Board of Returning Officers was not an office within the contemplation of the law, and therefore that the suit should not be brought under the intrusion act;

Held—That the members of the board are designated as officers in the act itself creating it, and that they come within the legal definition of the word.

Where the claims of individuals come in conflict, it is the true province of the judiciary to decide what they rightfully are under the constitution and the laws, rather than to decide whether the constitution and laws have been rightfully or wisely made.

Where two sets of officers claim to be the legal Board of Returning Officers, it is difficult to conceive why this is not a judicial question.

The Governor is not vested with the extraordinary discretion to determine who are the returning officers under the law.

The law of the twentieth November, 1872, relative to elections, did not repeal the election law of 1870, which created the Board of Returning Officers, and did not destroy their office. It was merely a revision and re-enactment of the former with emendations.

The provisions of the act of 1872 were intended to apply only to elections held under it after its passage, and by no correct or admissible rule of construction can its repealing clause be held to defeat an election had under the previous law, when the results thereof were not yet ascertained.

The Governor is not vested by the act of 1872 with authority to appoint the officers of the Returning Board of Election.

The Governor was wholly without legal right to suspend or remove the Secretary of State *de facto*, recognized as such by a court of competent jurisdiction and by himself.

The extrusion and exclusion of Bovee, the Secretary of State *de jure* from the office by the Governor did not and could not vest in said Governor the control of the office with the right to put in and put out the occupants thereof at his pleasure. There was no vacancy in the office of Secretary of State, Bovee, the incumbent *de jure*, who was only excluded or suspended, and whose office was in the meanwhile filled by Herron, the Secretary of State *de facto*; and yet Wharton was appointed Secretary of State without reference to any removal or vacancy. The commission is without effect.

Wharton, not being legally commissioned Secretary of State, could not as such be *ex officio* a member of the Returning Board. There is no evidence that he was elected member of the board, and it is not satisfactorily shown that he did take the required oath as a member.

Hatch and Da Ponte were not legally elected members of the Returning Board. The law provides that "in case of any vacancy by death, resignation or otherwise by either of the board, then the vacancy shall be filled by the residue of the Board of Returning Officers." Warmoth, Lynch and Herron were the residue, of whom two, Lynch and Herron, voted for Longstreet and Hawkins, and Warmoth voted for Hatch and Da Ponte.

Bovee, the Secretary of State *de jure* acted as assistant secretary of the said board until he was restored to his office under the decree of this court, after which he voted as a member of the Board.

A PPEAL from the Superior District Court, parish of Orleans. *Lynch*, judge of the Fourth District Court, acting in place of *Hawkins*, recused. *Fellows* and *Ray*, for A. P. Field, intervenor and appellant. *Semmes & Mott*, for defendants and appellees.

Justices concurring: Ludeling, Howell and Taliaferro.

Justices dissenting: Wyly and Kennard.

The opinion of the court was delivered by Howell, J.

The petition of the State on the relation, etc. in this case, represents that H. C. Warmoth, F. J. Herron, John Lynch, James Longstreet and Jacob Hawkins, constitute the legal board of returning officers and are duly qualified as such, for making the returns of the elections held in this State on the fourth November, 1872, and that Jack Wharton, F. H. Hatch and Durant Da Ponte, are pretending to be such officers and are attempting to act as such, and are interfering with the above named parties in the discharge of their official duties. The petitioner prays that said Wharton, Hatch and Da Ponte be cited and decreed to be intruders into and usurpers of the office of returning officers of elections, and that said Herron, Longstreet and Hawkins be decreed to be such officers.

In a supplemental petition an injunction is asked for restraining and prohibiting the defendants from acting as such returning officers or interfering in any way with the legal board. On this petition a rule to show cause and a restraining order were granted.

To this rule the defendants made the following answer:

1. "The petition discloses no cause of action of which this court has jurisdiction.

2. "The said Wharton, as appears by the affidavits on file, was duly appointed to discharge the duties of the office of Secretary of State during the suspension of George E. Bovee, and he is actually and peaceably in the discharge of such duties now, and was so at the time the petition and supplemental petition were filed.

3. "That as it appears by the affidavits on file, he and F. H. Hatch and Durant Da Ponte were duly summoned to sit as returning officers for the election held on the first Monday of November, 1872, being the fourth day of said month, and qualified as such, and their election and appointment are valid."

After hearing evidence and argument on both sides, the judge (Dibble) delivered a written opinion, in which he held that the informants were the legal returning officers and ordered that the injunction issue as prayed for.

Two days afterwards, to wit, twenty-first December, 1872, counsel for the defendants moved for "a new trial in the case on the grounds that the judgment rendered is contrary to law and evidence, and also because the plaintiff and relators have no standing in court, the law under which relators claim having been repealed."

This rule was fixed for trial on the twenty-fifth of the same month, on which day it appears that Judge Elmore presided, having been in the meantime inducted into the place of Judge Dibble; and on that day an exception was filed by defendants "to the petition of plaintiffs and their right to have and maintain the said suit, on the ground of and for the reason that the court has no jurisdiction of the subject matter thereof." The rule for a new trial was continued to the second day of December, when, after hearing pleadings and counsel, it was taken under advisement, and on the next day (the third) the Judge (Elmore) granted a new trial, giving as his reason that the act of the legislature, approved twentieth December, 1872, had repealed the act of 1870 creating a board of returning officers, and consequently no such board existed, and there was no one authorized to count the votes or make returns of the election of 1872, until new appointments should be made by proper authority. On the same day, as appears from the minutes of the court a motion was made by defendants' counsel and granted by the judge, dissolving the injunction issued in the case and dismissing the suit.

From the transcript of appeal it appears that this judgment was not signed until the second of January, 1873, when the record of the suit having been transferred to the Superior District Court, and the judge thereof being recused, it was signed by Judge B. L. Lynch of the Fourth District Court, who granted an appeal therefrom to A. P. Field, Attorney General, upon his allegation that he was aggrieved thereby, and his affidavit as to the amount of his interest involved.

The defendants have filed the following motion in this court:

"Now come the appellees and move to dismiss the appeal taken in this case on the following grounds:

1. "The judgment was rendered by W. A. Elmore, Judge of the Eighth District Court on the third day of December, 1872, and was of

a character that did not require signature, and no appeal could therefore be taken after the lapse of ten days from its rendition.

2. "That no judgment rendered by the said Judge of the Eighth District Court could be signed by the Judge of the newly created Superior District Court.

3. "That that portion of the act of the legislature creating the Eighth District Court, which authorized the appointment of a judge is unconstitutional, null and void, and therefore the said B. L. Lynch had no authority, acting in the place of Jacob Hawkins, recused, to sign said judgment.

4. "That A. P. Field, the appellant, has no interest whatever in taking this appeal, which this court can recognize.

5. "That A. P. Field, the appellant, has no interest in the appeal taken by him, inasmuch as the plaintiff returning board has in spite of the decision of the inferior court exercised the authority it claims, canvassed and announced the result of the election as to the office of Attorney General, and therefore as to appellant and his rights the said plaintiff returning board is *functus officio*, and no longer can exercise the functions it claims so far as said Field is concerned.

6. "That said appeal is made returnable on sixth January from a judgment signed second January, 1873, the usual period of citation, ten days, not being allowed and the law requiring the appeal to be returnable in ten days.

7. "The judgment was not signed at the instance or on the motion of Semmes & Mott of counsel for defendants, and if this fact is denied the case should be remanded to ascertain the truth, and the court had no right to sign a judgment unless applied to by the party in whose favor it was rendered."

We have thus detailed the proceedings because the main objections of the defendants, before us, to an examination and decision of this cause are purely technical, and we must therefore be careful to confine our investigation to the matters only which are really and properly presented in the record. And in this connection we will premise that we can give no force or effect to the document filed here during the argument, which bears the signature of the judge who dismissed the case in the court *a qua*. It appears simply to be the original motion, in the handwriting of defendants' counsel, to dissolve the injunction and dismiss the suit, filed on the third of December, and entered in the minutes of that date for the first and only time; there is no date to the act of signing and nothing to show when it was signed; (see C. P. 543, 546); it is not contained in the transcript in its present form and is no where referred to in the pleadings or record in either the inferior or appellate court, and it is inconsistent with the grounds of the motion to dismiss the appeal. We therefore lay it out of view.

First—The first ground is untenable. The judgment is one dissolving the injunction and dismissing the suit. It is therefore a final judgment which must be signed, and no appeal could be taken from it until it was signed, which was done on second January, 1873, and the appeal was properly made returnable within ten days from that date. C. P. 546; 3 La. 430; 19 An. 290. Act No. 45 of 1870, § 7.

Second—The law creating the Superior District Court authorized the judge thereof to do, in the cases transferred to it from the Eighth District Court which was abolished, what the judge of the latter could have done. Act No. 2 of December 11, 1872.

Third—Whether or not the appointment by the Governor of the Judge of the Eighth District Court or of the Superior District Court is unconstitutional, null and void, can not be determined in this collateral manner. He was or is acting under such color of authority that we can not, on a motion to dismiss, go behind it and declare it an absolute nullity. In the case of each of said courts the appointment of the judge was expressly authorized by the statute creating the court, as in the case of an original vacancy. Whether this might or might not be sustained as constitutional, in a proper proceeding, it is clear that this is not the occasion to settle the question. The said judge was or is manifestly an officer *de facto* at least, and his acts must be recognized just as those of an officer *de jure*, until upon a regular trial he is declared not to be an officer. 13 An. 404; 16 Peters 194; 56 Penn. 436; 15 Mass. 180; 13 Wendell 491.

Fourth—The alleged want of interest in the appellant is the main ground relied on by defendants.

It was contended in argument that the district court was without jurisdiction because the matter in dispute between the parties is too small, and hence this court has no jurisdiction.

This is met by the appellant with an affidavit of one of the members of the plaintiff board that his pecuniary interest in the suit exceeds one thousand dollars, and a reference to act No. 72 of 1871 (p. 182), shows that an appropriation was made for the compensation of the same returning officers. This mode of establishing an appealable interest, under such circumstances, is fully sanctioned by our jurisprudence. See 20 An. 575; 22 An. 602; 21 An. 336, 448; 23 An. 580, 769. In addition to this there can be no question as to the importance of the matters involved in this controversy. It affects to a great extent the whole political fabric of the State, and has even entered the departments of the federal government. Surely a subject which has commanded such widespread interest, and has required an argument of three hours length from such able counsel as represents the defendants, can not be designated as too insignificant to come within the consideration of the Eighth District Court of New Orleans or of this court.

The object of the limitation in the constitution to the jurisdiction of this tribunal, is simply to exclude from it such controversies between litigants as are of minor importance. This case is not of that class. Under every constitution of this State, containing limitations of jurisdiction, this court has entertained jurisdiction of suits of separation from bed and board and of divorce, where there was no appreciable money value involved. See 19 La. 567. And so too of suits by slaves for their freedom, 13 An. 406. The interest of the State and of the people of the State in the correctness of the ruling of the Eighth District Court of New Orleans in this proceeding is of such magnitude, that we would be derelict if we should, upon such bald technicality, refuse to entertain jurisdiction of the cause, even if there were no pecuniary interest shown, which however has been done. The chief reliance however seems to be on the fact that A. P. Field, in whose name the appeal is taken, is a third person without interest, and the case of the State ex rel. Sullivan v. Mount, 21 An. 755, is cited as conclusive against his right to appeal.

In that case this court said, "from his own statements we could not perceive that the appellant, a third party, had any interest whatever in the matter in dispute," and dismissed the appeal. Without questioning the conclusion arrived at, it does not, in our opinion, settle the point as to the appeal in this case where the statements of the appellant do make his interest apparent. Every case must be determined upon its own facts and merits.

A reference to the plain provisions of the law on this subject will furnish a safe guide. Art. 571 C. P., says: "The right of appeal is given, not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons not parties to such suit, when such third persons allege that they have been aggrieved by the judgment."

This seems to be unambiguous. It must be, of course, applied with reference to the constitutional jurisdiction of this court. If the matter in dispute involved in this suit, is such as to demand or authorize the action of this court, the right to appeal is accorded by the above article to third persons, who *allege* that they are aggrieved by the judgment rendered in a suit between other parties. The law does not say that such judgment shall be *res judicata* against the third persons to entitle them to appeal. It does not say that they shall have such right of action against one of the parties as to sustain an intervention in their suit, and claim the very thing which one of the parties is claiming. The only condition is they must make a reasonable showing that the judgment complained of is calculated, in its effects, to injure them. Now in this case, A. P. Field has made the requisite allegation, supported by his affidavit. And he has made it apparent to

our minds that he is aggrieved by the judgment appealed from, which annuls the authority by which he was declared to be elected Attorney General of the State, whose salary is five thousand dollars per annum, and the return of the plaintiff board is the foundation of his title to his office. Under the law it is not necessary, in support of his right of appeal, that he should demand in this suit to be declared legally elected nor that he should seek to regulate the judgment as between the parties to the suit, but simply to regulate it so far as it affects him. The difficulty of adjusting the rights involved in a litigation does not control the right of action. The cases in 20 An., 21 An., 22 An. and 23 An., above cited, support the right of the appellant to this appeal. That of the State ex rel. Byerly v. Judge, 23 An. 768, was much less favorable to such right than this case is, and in that case we sustained Byerly's right as a third person to appeal.

But the interest of A. P. Field as the attorney general of the State, by whom such actions as this may be brought, is such as to make it appropriate in him to ask a revision of the judgment rendered in the court of the first instance. If, however, there should be a reasonable doubt as to the right of appeal now before us, under the well established jurisprudence of this court we would maintain it as a constitutional right.

Fifth—What is said above disposes practically of the ground that the appellant has no interest, because the plaintiff board has exercised its authority in his behalf and is now *functus officio*. His interest is in having the legality of said board established at the time it was exercising its functions. He does not pretend that said board shall again act in his behalf, but that it shall be decreed to have been the legal board of returning officers, when it declared his election.

Sixth—The objection that full ten days were not allowed to bring up the appeal is without force. The law directs that the appeal in such cases shall be returnable within ten days after the judgment of the lower court. The return day may be in less but not more than ten days.

Seventh—It is immaterial at whose instance the judgment was signed. The law requires the judge to sign all definitive judgments. C. P. 546.

Our conclusion is that this appeal is properly taken and the motion to dismiss is refused.

The answer of the defendants to the rule *nisi* pleads no cause of action, and puts at issue the right of the respective parties to be declared the legal returning officers.

Upon the plea or exception thus made it was contended in argument that the board of returning officers is not an officer within the contemplation of the law, and therefore the suit should not be brought under the intrusion act. The counsel could hardly be serious in this, as in

another part of his argument he insisted that it was a court vested with powers to judge. Be that as it may, the members of the board are designated as officers in the act itself creating it. "An office is a right to exercise a public function or employment, and to take the fees and emoluments belonging to it." An officer is one "lawfully invested with an office." Bouvier, *verbo* Office. The fact that no emoluments or fees are fixed in the law itself does not necessarily imply that none will be given or that none are attached to the office. In this case the contrary appears to be true, and it comes clearly within the above definition.

It was also contended, somewhat vaguely it is true, that the matters at issue are not properly questions to be determined by the judiciary. We have heard no good reason to sustain this proposition, nor can we imagine any. It is not and can not be denied that we have a constitution and laws made in conformity thereto in this State; and it is the province of courts to decide on the rights which conflicting parties can legally set up under them. "Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them rather than disputed points in making them.

When claims of individuals come in conflict under them, it is the true province of the judiciary to decide what they rightfully are under such constitution and laws, rather than to decide whether those constitutions and laws have been rightfully or wisely made." 7 How. 22. Two sets of individuals claim to be the legal board of returning officers. It is difficult to conceive why this is not a judicial question. It is the province of courts to say what the law is—*jus dicere*. Because the law makes it the duty of the Governor to open, in the presence of the said returning officers, the statements of the supervisors of registration, it can not be inferred, as counsel intimate, that he is vested with the extraordinary discretion to determine who are the returning officers under the law. No such power or discretion is conferred on him.

The next objection is that the law signed by the Governor on the twentieth November, 1872, relative to elections, repealed the election law of 1870 which created the board of returning officers, and thereby destroyed their office.

If this were so, the action of the judge of the Eighth District Court in granting a new trial and subsequently dissolving the injunction and dismissing the suit, were nullities for want of parties to stand in judgment. But we are clearly of opinion that no such effect followed the passage of the said act.

Both laws were enacted to regulate elections in this State; the one of the later date is but a revision and re-enactment of the former, with such emendations as were deemed necessary. The new law, it is

true, contains a repealing clause, but it could not have been the intention of the legislators to repeal or destroy what they had carefully guarded in the new law. The office of the board of returning officers is not abolished, but is preserved in the act signed on twentieth November, 1872. The mode of filling the office alone is changed. Under article 122 of the constitution, the old members continued in office to discharge the duties imposed on them by the law, until their successors were inducted into office, and by the election law they were to continue in session until the returns are completed. Such is the doctrine enunciated in *State ex rel. Holmes v. Wiltz*, 11 An. 439; *State v. Kreider*, 21 An. 482; and *State v. Brewer*, 22 An. 273.

It is very clear that the provisions of the act of 1872 were intended to apply only to elections held under it after its passage, and by no correct or admissible rule of construction can its repealing clause be held to defeat an election had under the previous law and the results thereof not yet ascertained. It would be worse than trifling with the right of suffrage thus to change laws regulating elections. The difficulty is not remedied by the theory suggested by counsel, that after the approval of the new statute, the Governor, *ex necessitate rei*, must or could appoint a new board to complete what, by his own act, the former board was rendered powerless to complete. Such a necessity could not be created by him for such a purpose. It is inconsistent with and opposed to our republican system of government. The Governor is not vested by the new law with authority to appoint the returning officers. They are to be elected by the Senate, and the Senate as elected had to be organized before it could elect, and its organization depended on the result of said election.

On the merits of this case there is no serious difficulty.

By the act 100 of 1870, under which the election was held on the fourth of November, 1872, the Governor, the Lieutenant Governor, the Secretary of State and John Lynch and T. C. Anderson, or a majority of them, were the returning officers of said election, and a majority of such majority constituted a quorum. Two of them, the Lieutenant Governor and T. C. Anderson were disqualified from acting because of being candidates. These officers were required to meet within ten days after the election to canvass and compile the statements of votes made by the supervisors of registration, and make returns of the election to the Secretary of State, and to continue in session until such returns are completed. Four of them, the Governor, Lieutenant Governor, the Secretary of State and John Lynch, met on the twelfth of November, and after selecting Governor H. C. Warmoth President, and John Lynch, Secretary of the board, and discussing the question of the disqualification of two members, adjourned to meet on the next day. The minutes of these two meetings as kept by the

president and by the secretary of the board are in the record, and they substantially correspond up to a certain point of the proceedings on the second day.

We will adopt the minutes signed by H. C. Warmoth, up to that point, to wit:

"The board met at eleven o'clock, Tuesday November 12, 1872, at the Governor's parlor, in the State House.

"Present: Messrs. Warmoth, Governor; Pinchback, Lieutenant Governor; Herron, Secretary of State, and John Lynch.

"Mr. Herron raised the question of the qualification of Messrs. Pinchback and Anderson to act as members of the board.

"Mr. Warmoth asked for time to examine the question and for the presence of Mr. Anderson.

"After much debate the board adjourned to meet at 12 M., November 13, at the Governor's office. At 12 M. the board met pursuant to adjournment. Present: Messrs. Warmoth, Lynch, Pinchback and Herron.

"Chief Justice Ludeling appeared to swear in the members of the board, and each took the oath with the exception of Mr. Pinchback.

"On motion of Mr. Lynch it was ordered, that by reason of ineligibility, Messrs. Pinchback and Anderson be not permitted to act as members of the board.

"Mr. Pinchback asked the opinion of the Chief Justice, who took the same view.

"Mr. Pinchback acquiesced in the action of the board and withdrew.

"Mr. Jack Wharton then appeared and presented a commission from the Governor as Secretary of State, exhibited his oath of office as Secretary of State," etc. * * *

Just here the difference in the two accounts of the proceedings begins. Warmoth states that Wharton exhibited his oath as a member of the board and took his seat; that F. H. Hatch and Da Ponte were elected by the votes of himself and Wharton (Lynch not voting) to fill the vacancies; that Hatch and Da Ponte were then sworn by Judge Cooley and took their seats; that at this point General Herron stated that the proceedings were irregular and left the room, followed by Lynch.

Lynch, the regular secretary of the board, gives a somewhat different account, and shows that he and Herron voted, after formal nomination, for James Longstreet and Jacob Hawkins to fill the vacancies, and that he and Herron voted no upon the nomination of Hatch and Da Ponte made by Warmoth, after which he and Herron left the room.

We think there can be no doubt that the effort to make Wharton a member of the board was a total failure. Herron is described by Warmoth himself as Secretary of State and a member of the board

by virtue of such office up to the appearing of Wharton, during the proceedings on the second day of the meeting. The order suspending Bovee as Secretary of State and appointing Herron by the Governor, on the twenty-ninth August, 1871 (which was before us in the case of the State ex rel. Bovee v. Herron), is in this record as a part of Wharton's testimony. This document, the above named suit, and the published statutes of the State since August, 1871, show that Herron was *de facto* Secretary of State, and according to the opinion in the suit just named and the constitution and laws of the State the Governor was wholly without legal authority to suspend, remove or appoint said officer. The extrusion and exclusion of Bovee from the office by the Governor did not and could not vest in the Governor the control of the office, with the right to put in and put out the occupants thereof at his pleasure. His attempted appointment of Wharton was an absolute nullity and gave Wharton no color of authority to act either as Secretary of State or member of the Board of Returning Officers. Owing to the manner in which the case of the State ex rel. Bovee v. Herron, decided finally about the time of the events above narrated was managed, there was a final judgment of a court of competent jurisdiction decreeing the suspension of Bovee as Secretary of State and appointment of Herron to discharge the duties thereof to be legal; and the effect of that judgment continued until the decision by this court (about second December, 1872,) just referred to. Hence, as to the world, Herron was the acting Secretary of State at the above date and it was not in the power of the Governor to remove him—the Governor having no control of said office. There was no vacancy in the office, Bovee being only suspended or excluded, and yet the commission of Wharton, dated thirteenth November, 1872, the day he claimed to be a member of the board, shows that he was appointed Secretary of State without any reference to any removal or vacancy—a commission without any effect.

There is no pretense that Wharton was elected a member of the board, and it is not satisfactorily shown that he did take the required oath as a member. It follows that as Wharton was without any official authority or standing, his pretended vote, as a member of the board of returning officers on the nomination of Hatch and Da Ponte, was equally without legal effect, and that the said Hatch and Da Ponte were not elected members of said board, a majority not having voted for them; but that Longstreet and Hawkins, who received a legal majority of the votes were duly elected, and they with Warmoth, Herron and Lynch constituted the legal board, a majority of whom could act. The law provides that "in case of any vacancy by death, resignation or otherwise by either of the board, then the vacancy shall be filled by the residue of the board of returning officers." Warmoth,

Lynch and Herron were the residue, of whom two, Lynch and Herron, it is shown, voted for Longstreet, and Hawkins and Warmoth voted for Hatch and Da Ponte. It appears from the record that Bovee acted as assistant secretary of the said board until he was restored to his office under the decree of this court, after which he acted, it seems, as a member of the board.

Our conclusion is that at the institution of this suit Warmoth, Herron, Lynch, Longstreet and Hawkins were the legal board of returning officers under the law of 1870 (No. 100), for the election on the fourth day of November, 1872; that the defendants, Wharton, Hatch and Da Ponte were intruders; that the injunction against them properly issued; that the act No. 89 of twentieth November, 1872, did not have the effect of abolishing the said board of returning officers, who met on the twelfth November, 1872, and were by the first mentioned law required to "continue in session" until the returns of said election were completed; and that the judge of the Eighth District Court for the parish of Orleans erred in dissolving the said injunction and dismissing this suit.

It is therefore ordered and adjudged that the Board of Returning Officers, composed of H. C. Warmoth, F. J. Herron, John Lynch, James Longstreet and Jacob Hawkins, was the legal board of returning officers of elections of the State of Louisiana, and it is decreed that the judgment of the court *a qua* be avoided and reversed so far as the appellant is concerned, and that the defendants, appellees, pay costs of this appeal.

WYLY, J., *dissenting*. The judgment of a court without jurisdiction *ratione materiæ* is a nullity so absolute it need not be pronounced. The court will notice the want of jurisdiction *ex proprio motu*.

It is well settled that an intervention is not allowable where the party seeking to intervene would have no separate cause of action against either or both of the litigants, or where he has no claim to the immediate object of the citation.

The immediate object of the litigation in the case before us is to determine the title to the offices of the returning board of election, under act No. 100 of the acts of 1870.

The controversy is between the relators and the defendants for these offices.

A. P. Field, who intervenes and brings up this appeal, does not claim the offices in dispute. He holds the office of Attorney General; and as neither the relators nor the defendants set up claim to his office, or attempt in any manner to impede the administration thereof, he has no cause of action against either of them.

He, therefore, has no right to intervene, because the law will not allow a party to thrust himself into a litigation he would be prohibited from instituting for himself. The object of interpleading is to abridge litigation and avoid the multiplicity of suits.

Having no cause of action against either of the litigants and not claiming the offices in dispute, how can A. P. Field interplead, and by appealing protract a vexatious litigation dropped by the original parties?

Such pleading is not allowable in ordinary suits.

But this is a proceeding under the intrusion act to determine whether the relators or the defendants are entitled to the offices of the returning board of election, under the act of 1870.

The law provides that suits of this character must be brought in the name of the State on the relation of the District Attorney or the Attorney General, against the party accused of intruding into or unlawfully holding an office; that the name of the person claiming to be rightfully entitled to said office may be joined as plaintiff with the State, and that when the intrusion is made apparent the court may decide the defendant to be an intruder, eject him from office, and order that the person joined with the State as plaintiff may be inducted into office. Acts of 1868, pages 71 and 199.

No provision is made for an intervention in a suit of this kind, and in my opinion it is not allowable.

If a controversy for a certain office be settled improperly under a proceeding of this character, and the person inducted into office is not entitled to it, as against a third party who was not joined as plaintiff with the State, the rights of such third party are in no manner impaired. He can by mandamus, if necessary, compel the District Attorney or the Attorney General to institute, in his behalf, a proceeding in the name of the State, under the intrusion act, and have his title to the office established and the previously successful litigant ejected therefrom. After the time for contesting the election has passed, the only suit to establish title to office that can be brought, is a suit under the intrusion act, and that as before remarked must be brought in the name of the State. The State, as before remarked by this court, must take the initiative; no one can litigate for office, under that statute, in his own name. And if a person can not in his own name bring an action for the office he claims, how can he accomplish the same object by filing a petition of intervention in his own name, setting up his separate demand?

As I understand the intrusion law no one will be allowed to demand an office in this State in a proceeding in his own name, whether he pleads directly in a separate action, or whether he interpleads in an action between other parties.

Whenever he sees fit to set up his demand for an office the statutes to which I have referred prescribes the precise form or mode of procedure in which he must bring that demand in order that the court may decide the title to the office.

If the State under the intrusion law must be the prominent litigant and no demand for office can be set up except in the name of the State, how can there be an intervention? Can the State intervene in her own suit? Can the State suing for A set up a separate demand in her own suit in behalf of B? Can the same party be both plaintiff and intervenor in the same suit? Such a proposition to a legal mind is utterly absurd. But, then, how are the rights of several persons claiming a particular office to be determined without numerous suits, which the law abhors. The answer is plain and simple. It is found in section nine of the intrusion law, being act No. 58 of the acts of 1868. It is in these words: "That where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons in the same action in order to try their respective rights to such office or franchise."

Here, then, to simplify pleading and to settle conflicting titles to office, the State has enacted a law by which she can in her own name, in one action, sue all the claimants to the office in dispute, and in the same action "try their respective rights to such office or franchise." From the very language of the law it is apparent that no interpleading was contemplated by the law-giver. And, indeed, under the statute it could not be done, because, as before observed, the State alone can bring the suit and she can not, in the same action, occupy two contradictory positions, that of plaintiff, the prominent litigant, and that of intervenor, a third party, a stranger to the suit. Is it doubted that the State is the real litigant in suits under the intrusion law? I point to the State v. Kreider, 21 An. 482, and numerous other decisions wherein this court has so often affirmed it; and I refer to the statute itself.

It is well settled that in a contest for office the pecuniary interest involved is the amount of the salary.

In the suit before us there is no salary at all. Consequently, as between the original parties, the matter in dispute does not exceed \$500, and this court is without jurisdiction *ratione materiae*.

To ascertain the jurisdiction of this court it is idle to discuss general principles, or to cite the adjudications of the Supreme Court of the United States, because it does not spring from such sources. The jurisdiction of this court is limited and defined in precise terms in the Constitution of this State, the instrument creating it, and beyond these limitations we can not go without usurpation.

This court has only appellate jurisdiction, "which shall extend to all cases where the matter in dispute shall exceed five hundred dollars;" * * * Article 74, Constitution of 1868.

But the intervenor and appellant contends that as his salary of Attorney General is \$5000, he has a pecuniary interest in this litigation exceeding \$500, and therefore the court as to him has jurisdiction. For argument let us assume that this is so. We then have the anomaly of a jurisdiction as to one litigant and no jurisdiction as to the others, and positively no jurisdiction as to the offices in controversy, the immediate object in dispute, and of the litigation.

The matter in dispute between "A" and "B"—the very object of their litigation has a pecuniary value less than five hundred dollars; neither can appeal to this court for want of jurisdiction; the difficulty can be obviated; the judgment below can be revised; all that is necessary is for a third party to aver that as he owns some other object worth five thousand dollars, he has a pecuniary interest in the controversy exceeding five hundred dollars, and therefore can intervene and appeal.

If the doctrine contended for be true, all the cases decided by the inferior courts of this State, including justices of the peace, may in the same manner, be brought before this court for revision. Such a proposition is unreasonable and absurd.

In my judgment the title to an office, the salary of which is less than five hundred dollars, can not be determined by this court for want of jurisdiction *ratione materiæ*, it matters not who is the appellant, and it matters not how many affidavits are filed setting up a pecuniary interest exceeding the amount of the salary.

"A third party appealing from a judgment must show a direct pecuniary interest in the subject matter of the suit." State ex rel. Belden, Attorney General v. Markey, Kaiser, et als. 21 An. 743; 1 N. S. 308; 4 N. S. 342; 2 R. 391.

The subject matter of this suit is the title to the offices of returning board of election, under act No. 100 of the acts of 1870, to which offices there is no salary. Therefore neither the original litigants nor the intervenor has a direct pecuniary interest in the subject matter of this suit, and therefore can not appeal, because this court is without jurisdiction *ratione materiæ*.

It is therefore my judgment that if an intervention in a case like this were allowable, and if a third party could intervene and appeal from a judgment not appealable by the original litigants (because the matter in dispute is less than \$500), the intervenor, A. P. Field, has not shown a direct pecuniary interest in this suit sufficient to entitle him to the appeal or sufficient to give this court jurisdiction.

If he had been joined as plaintiff with the State in this suit, he could not appeal, because the subject matter of the suit is less than \$500. The argument, however, is urged that Field has a direct pecuniary interest in this case, because as the delay for contesting elections

has passed (more than ten days after the election having elapsed), he has no other way to vindicate his title to the office of Attorney General. That if the board by whom he was returned as elected was not the lawful returning board, then his title to the office has no basis upon which to rest. Consequently his entire salary as Attorney General is involved in this controversy between the two returning boards. The answer to this argument is two-fold:

First—The controversy between these returning boards in no way prevented him from instituting, within proper time the usual proceedings to contest the election.

Second—His title to the office of Attorney General can not now be determined as against H. N. Ogden, his opponent at the election, because the latter is not a party to this proceeding. Besides, in a controversy for one office the title to another office (separate and distinct) can not be determined. A proceeding "under the intrusion act" can only determine the title to the office in dispute, and no one can become a party to that proceeding who does not claim the immediate object of the litigation.

If A. P. Field, who was returned as elected Attorney General, can intervene in this controversy, every candidate for office at the late election, every person expecting an office if his party prevails, and every person incidentally or remotely interested in the settlement of the issue, may intervene, and the rights of everybody, the titles to all the offices in the State, may at once be determined, notwithstanding the opponents of these various intervenors were not cited and were not parties to the suit between these returning boards.

An argument that leads to such monstrous absurdities ought not to be accepted by this court as correct.

In the State v. Mason et als., 14 An. 506, where parties not claiming the offices of mayor and councilmen of Carrollton contested the election of the defendants to said offices, this court said: "It appears reasonable that no one but a person pretending to have a right to an office should be permitted to test the right of the incumbent to that office."

In Voisin and others v. Leche and others, 23 An. 25, a similar case, this doctrine was affirmed by this court, the identical language being adopted by Chief Justice Ludeling, the organ of the court.

In State ex rel. Sullivan et als. v. Mount et als. 21 An. 755, where the controversy was between two boards of school directors, and where Kendall, the secretary of one of the boards appealed, claiming that as his salary was eighteen hundred dollars he had a pecuniary interest in the controversy exceeding five hundred dollars, this court held that: "In a controversy for office under 'the intrusion act,' a

third party not holding or claiming the office in dispute, can not appeal from the judgment of the court *a qua*."

There the board that appointed Kendall secretary was unsuccessful in the controversy with the other board of school directors, and could not appeal, because of the want of a pecuniary interest (there being no salary allowed these school directors of the parish of Orleans), Kendall, the secretary appealed and contended that unless his right to appeal was maintained, he would lose his office, affording him a salary of eighteen hundred dollars per annum; that the very basis of his office rested upon the reversal of the judgment in the controversy between these two boards of school directors.

The court held that as he did not claim the offices in dispute (the immediate object of the litigation), Kendall could not "appeal from the judgment of the court *a qua*."

Here neither of the returning boards of election have appealed from the judgment in the controversy between them, because having no salary there is no pecuniary interest involved as between them. A. P. Field claiming to be returned Attorney General by one of these boards whose suit under the intrusion act, was dismissed, has appealed and he contends that unless that judgment is reversed and the board which returned him as elected Attorney General is recognized by this court and declared the lawful board, his title to that office has no basis upon which to rest.

The case presented by him is identical in principle with that presented by Kendall, and should have the same solution. He is a third party, not claiming the offices in controversy, and "can not appeal from the judgment of the court *a qua*." 21 An. 755.

The appellant cites the case of Byerly v. Judge of the Eighth District Court (23 An. 768), to show that a third party having an appealable interest may appeal.

That case is not like the one before the court; Byerly showed a direct pecuniary interest in the matter in dispute.

I deem it proper to remark, however, that there is a feature of that case that I do not approve of. I was not present at the hearing and took no part in its decision.

Whatever comfort it may give the appellant, however, is utterly annihilated in the subsequent final decision of that same case, reported in 24 An. 115.

The case in 12 An. 48, cited to show that a third party may appeal, is wholly unlike the case now before the court. There the property of a third party had been seized and the appeal was from the judgment dissolving his injunction. It being a separate demand, C. P. 398, and the value of the property being sufficient to give this court jurisdiction, there was no error in maintaining the appeal.

There are other grounds for dismissing the appeal which I deem it unnecessary to notice, because, to my mind, the argument which I have endeavored to make fully maintains the exception of defendants, that A. P. Field has no right to take this appeal. Believing that the case is not within the jurisdiction of this court, and that the decree of a court without jurisdiction *ratione materiæ* is an absolute nullity, I hardly think it necessary to enter upon an elaborate discussion of the issues presented for adjudication on the merits. I will state, however, some of the conclusions forced upon my mind from a careful consideration of these questions.

I believe the Governor had the right to sign the new election law on the twentieth of November, 1872; that it became operative from the moment of the signing, and that it entirely repealed the law creating the offices in controversy, to wit: act No. 100 of the acts of 1870.

That the Governor has the right in this State to sign and approve laws after the session of the Legislature has ended, has often been decided by this court; indeed I regard the jurisprudence settled on this point. But the appellant contends, with some show of plausibility, that when this act was signed (the twentieth of November, 1872), the legislature that enacted the law had passed out of existence (the terms of most all of the members of the General Assembly having expired); that with the cessation of their terms ended all of their unfinished business; that the Governor could not complete by his approval and signature a statute after its authors had ceased to exist.

This argument is ingenious but unsound. The fallacy lies in supposing that the law-making power had ceased to exist. While our structure of government remains neither of the co-ordinate branches thereof can cease to exist. The legislative, executive and judicial departments never cease to exist, although the persons entrusted by the people to administer them often discontinue to do so, because of death, resignation, or the lapse of the terms for which these public functionaries were chosen.

In this State the effect of a repealing law is not always a question of construction.

When a repealing law, like any other law, "is clear and free from ambiguity, the letter of it is not to be disregarded under pretext of pursuing its spirit." C. C. 13.

It is only when the law is dubious in its language that its meaning must be sought by construction. C. C. 16.

In my opinion the election law approved twentieth November, 1872, entirely repealed the law of 1870. It devised a new and different way of canvassing the votes and making the returns, and it entirely abolished the offices involved in this controversy. How the incumbents of offices that have been abolished can pretend to hold over under

article 122 of the constitution till their successors are inducted into office I cannot imagine.

How can there be an inducting of successors into offices, that do not exist?

But great stress is laid upon the case of Kreider, 21 An. 482, and it is insisted that the ruling in that case covers this case.

I do not think so. The statute interpreted in that case differed very materially from the one now under examination. There the court held that: "The thirteenth section of the act of September 14, 1868, repealing the charter of Jefferson, approved March 8, 1867, did not abolish the offices of the corporation. This clause only repealed the old charter in so far as its provisions were not incorporated in the new charter."

The title of that act was "An Act for revising and amending the charter of the city of Jefferson." The title of the act only proposed to "revise and amend" the charter. Under cover of such a title the old act could not be abolished, and any clause to that effect would be repugnant to article 114 of the constitution, requiring the objects of every statute to be expressed in the title thereof.

In the Kreider case it was held that the "clause only repealed the old charter in so far as its provisions were not incorporated in the new charter."

The provisions of that act "did not abolish the offices of the corporation," but continued them.

In the statute before us, the offices of returning board in the old law, are not carried over and incorporated in it. Therefore these offices are abolished under the authority of Kreider's case, which has been produced to show the reverse.

In my judgment, the act approved twentieth November, 1872, is not mere revisory legislation; but whether it is not, is of no consequence. Because the offices claimed by the relators under the old law are abolished, if not directly at least by implication, because the continuing of said offices is not provided for in the new law and it is inconsistent therewith.

The provision of act No. 100 of the acts of 1870 creating these offices and designating the duties to be performed therein is in conflict with the provisions of the act of twentieth November, 1872, and is therefore repealed.

This was the view taken by this court in the analagous case of the State ex rel. Montieu v. Lavigne, 23 An. 111.

Here, to my mind, another difficulty arises. What judicial effect can the decision have? What legal right shall we order to be executed? A. P. Field can not be put into the offices in controversy, because he don't claim them. We can not eject the defendants and induct into

these offices the relators, because the plaintiffs have not appealed from the judgment dismissing their suit. 1 N. S. 308.

Besides the defendants are not claiming the offices, but contend that they, as well as the plaintiffs, are out of office by reason of the approval of the election law of 1872.

Furthermore, if the approval of said law is not valid, the relators have nothing to contend for, having canvassed and made their returns, notwithstanding the suit, they have exhausted the powers confided to them and they are now *functus officio*; they are no longer excluded from office. There are other questions which I deem it unnecessary to discuss.

With all due respect for the views of my learned associates who compose the quorum deciding this case, I feel constrained to differ with them in the conclusion to which they have arrived, because I believe their decision is not in harmony with the analogies of our law and the numerous adjudications of ourselves and our predecessors.

I believe that it practically overrules many important principles and points of practice heretofore deemed settled, and that it is a new departure in the jurisprudence of our State.

For the reasons stated I feel constrained to dissent in this case.

KENNARD, J., *dissenting*. I dissent from a majority of the court. A motion to dismiss this case is made on the following grounds, to wit:

First—That the judgment rendered by the judge *a quo* did not require signing and can be appealed from only within ten days from rendition.

Second—That no judgment rendered by the judge of the Eighth District Court could be signed by the judge of the newly created Superior Court.

Third—That the portion of the act creating the Superior Court which authorizes the appointment of the judge is unconstitutional and therefore Lynch, the judge of the Fourth District Court, could not act for Hawkins, the appointed judge of the Superior Court, who recused himself.

Fourth—That A. P. Field, Attorney General, has no interest which allows him to appeal.

Fifth—That the Returning Board, defendant, has acted and is *functus officio*.

Sixth—That the appeal is made returnable January 6, 1873, from a judgment signed second January, 1873, the usual period of citation being ten days, the law requiring the appeal to be returnable in ten days.

Seventh—That the judgment appealed from was not signed at the instance of the defendants, and if this fact is denied, the case should be remanded to ascertain the truth, that the court was only authorized to sign the judgment upon application of the party in whose favor it was rendered.

The facts of the case necessary to decide the motion to dismiss are :

That the suit was dismissed by the judge of the Eighth District Court because a new law, approved November 20, 1872, No. 98, entitled "An Act to regulate the conduct and to maintain the freedom and purity of elections ; to prescribe the mode of making returns thereof, to provide for the election of returning officers and defining their powers and duties ; to prescribe the mode of entering on the rolls of the Senate and House of Representatives ; and to enforce article one hundred and three of the constitution, repealed the election law of 1863, and as there is no existing Returning Board" there can be no party to complain and appeal.

A brief history of the case is essential to a clear understanding of the law applicable to the motion to dismiss—the sole question now under discussion.

The petition alleges that Jack Wharton, F. H. Hatch and Durant Da Ponte are pretending to be returning officers and are interfering with plaintiffs, Warmoth, Herron, Lynch, Longstreet and Hawkins, in the discharge of their duties.

The above named five persons—four only of whom are shown to be plaintiffs—are the real plaintiffs. They file a supplemental petition and pray for an injunction, and ground their application on the fact that the attempt of defendants to act in the manner alleged in the original petition, and to sit as returning officers, will defeat the object of this suit and render nugatory the judgment therein prayed for.

A rule *nisi* was granted upon this supplemental petition, which after filing of affidavits and counter affidavits, was made absolute and the injunction granted by the Eighth District Court. An answer to the rule *nisi* was filed answering :

First—That the supplemental petition disclosed no cause of action of which this court has jurisdiction.

Second—That Wharton was duly appointed to discharge the duties of Secretary of State during the suspension of Herron.

Third—That Wharton, Hatch and Da Ponte were duly summoned to sit as returning officers for the election held the first Monday of November 1872, being the fourth day of said month, and qualified as such.

There are two judgments of the lower court, one rendered November 19, 1872, notice of which issued the same day ; the sheriff received it on the twentieth and served it on the twenty-second of November, on Hatch and Da Ponte, and on twenty-eighth on Wharton.

On November 21, defendants moved for a new trial on the grounds that the law is repealed under which the suit was instituted, and that the judgment is contrary to law and evidence. A new trial was granted. On November 25, defendants filed an exception to the jurisdiction of the court.

Three different judges sat upon this case between its first institution and the dates of the appeals. Judge Dibble's last act was November 19, the date of the rendition of the judgment appealed from.

Judge Elmore's first act was the granting of the new trial. This order was made December 3, 1872, and on the same day Elmore, judge, dissolved the injunction and dismissed the suit on the grounds that the act No. 98, approved November 20, 1872, had taken the place of the old law and that no one had authority to count the votes or make returns of the election of 1872 until new appointments are made by proper authority.

All the proceedings up to this point had been in the Eighth District Court.

On December 17, the Superior Court was acting in the case. A motion on that day was made by A. P. Field, alleging that he was Attorney General, and that the judgment in the case rendered by the Eighth District Court "jeopardizes" the position of your petitioner in his office, whereby your petitioner has an interest over five hundred dollars, his salary being five thousand dollars per annum.

A devolutive appeal was granted the same day, December 17, by Lynch, then judge of the Fourth District Court, acting for Hawkins in the Superior Court. On January 2, 1873, another petition for appeal is made—the judgment is signed on the same day.

The appeal is again granted, another bond for the same amount, three hundred dollars, is given and the order is that this appeal be devolutive and suspensive.

After unweaving this "tangled web" of facts, the points of law necessary to determine the question of dismissal are few, simple, and well settled by the jurisprudence of this court, and these decisions are supported as sound law by adjudicated cases in most if not all of the States, and of the Supreme Court of the United States.

I will consider first the question of jurisdiction, as determined by the amount involved, and whether Field's interest, who is sole appellant, even were it decided that the amount as between the original parties to the suit was sufficient to give jurisdiction, amounts to five hundred dollars.

What is the allegation made in the petition of intervention by Field under which he offers proof by his affidavit of his interest? The language of his petition is that the judgment "jeopardizes" his position in his office.

The case of the "State ex rel. D. C. Byerly v. The judge of the Eighth District Court, 23 An. p. 768," decided by this court without dissent November 1871; Taliaferro, J. is relied upon as sustaining this view.

In that case Byerly sought relief by appeal from a judgment rendered on a mandamus proceeding against John S. Walton, Administrator of Finance, in favor of the clerks of the Fourth and Eighth District Courts, ordering Walton to file all suits under his control, irrespective of amounts involved, in said courts, alleging that his interest was over five hundred dollars, as it deprived him of much more than that, his court having previously had jurisdiction to the exclusion of all other district courts, of all suits where the amount did not exceed one hundred dollars.

The court *a qua* refused him the right to appeal and this court reversed the judgment.

Judge Taliaferro, the organ of the court, said: "It is settled by several decisions of this court that a third party may appeal from a judgment if he allege and show a direct and pecuniary interest in a suit, and that that interest amounts to a sufficient sum to give jurisdiction to the appellate court. The relator in this case made oath in the court below that he has an interest in this case exceeding one thousand dollars resulting to him from fees of office accruing to him as clerk of the Third District Court."

What interest has Field to disturb the judgment appealed from? He could have none whatever, provided the members of the board, who were defendants, did their duty, which was to count the votes and make returns. A majority of votes for him counted by that board would secure his salary fully as well as by the other board.

What does the law presume with reference to its officers? That they will do their duty. This presumption is as uniform as that innocence is presumed until guilt is proven.

I can not consent to give this court jurisdiction by a presumption that violates the first principles of all law.

Courts should not intervene on allegations of parties' rights being in jeopardy, except in a few cases specially provided for and with great caution.

In the case of the United States v. The brig Burdett, 9 Peters 682, the Supreme Court of the United States say—

"That frauds are frequently practiced under the revenue laws can not be doubted; and that individuals who practice these frauds are exceedingly ingenious in resorting to subterfuges to avoid detection is equally notorious. But such acts can not alter the established rules of evidence, which have been adopted as well with reference to the protection of the innocent as the punishment of the guilty."

"A review of the evidence in this case must create a suspicion of fraud.

"This is the rule (the presumption of innocence until there is proof of guilt) which governs a jury in all criminal prosecutions, and is no less proper for a court when exercising a maritime jurisdiction."

Presumptions of fact arise from certain other known facts, and must be of such a character as to exclude all other presumptions.

We have no facts before us on which to base such a presumption as would give the intervenor any interest, pecuniary or otherwise, in this appeal.

The same principles must determine the question of the State's interest, were the case properly before us on appeal at her instance.

In the case of the State ex rel. S. Belden, Attorney General v. Markey, Kaiser and al., 21 An. 743, decided in December, 1870, by this court, Chief Justice Ludeling, the organ of the court, said:

"The relators have moved to dismiss the appeal taken by the city of New Orleans on the following among other grounds, to wit:

"That the city is without interest, pecuniary or otherwise, in the suit. The law grants the right of appeal to any one though not a party to the suit, if he have an interest in the subject matter of the suit. C. P. p. 571. But he must allege and show that interest; and it must be direct, pecuniary interest; and cites 1 N. S. 308; 4 N. S. 342; 4 N. S. 622; 2 Rob. 391. The matter at issue is the right to office. Whether the relators or defendants are under the law entitled to hold the offices of alderman and assistant alderman."

In the motion for an appeal it is alleged that the city of New Orleans is interested in this suit in a sum exceeding five hundred dollars.

"The nature of this interest is not stated. In the affidavit of the Mayor accompanying the motion for an appeal, it is alleged that the city of New Orleans has a large pecuniary interest at stake; that the revenues and property of the city are administered by the Common Council, and that both the property of the city of New Orleans and its revenues are valued for the present year at over several millions of dollars; by law placed under the control of the council and would be under the control of W. R. Fish and the other informers if said parties were permitted to exercise said duties and to occupy the seats of the aldermen and assistant aldermen in the Common Council of said city of New Orleans. Defendant further says that the city of New Orleans is a political corporation duly chartered by law; that said city is interested in this suit in a sum exceeding five hundred dollars, and that it is aggrieved by the interlocutory orders and the final judgment herein rendered."

We have examined the record *in vain* to ascertain what the pecuniary interest of the city in this suit is.

How can any pecuniary interest be said to be involved in this suit, where there are neither salaries, fees nor perquisites attached to the offices of aldermen and assistant aldermen, which are the subject of this suit? But whether there can be any pecuniary value attached to said offices or not, it is clear the city has no direct pecuniary interest in the suit.

"It has been decided that in a suit for something which has an appreciable money value, the oath of the appellant may supply the omission of evidence as to the value of the thing in controversy.

"But we are not prepared to say that the *mere affidavit* of any one, that he is interested in a suit between other parties will authorize an appeal by him." 2 Rob. 291, 4 N. S. 342.

He also cites the case of Samuel Johnson v. The city of New Orleans, decided by this court. There is no salary attached to the returning board, and affidavits are the proofs of interest.

I am unable to see what interest, pecuniary or otherwise, Field has in this case to enable this court to grant him the right of appeal. Certainly his interest can not exceed that of the city of New Orleans, who alleged and swore that millions of her property were involved. The appeal was denied her, and I know no law or decision which can sustain his claim to an appeal in this case. This case should be disregarded by this court with great caution. The report shows that it was carefully considered and the previous rulings of this court on the same subject closely scrutinized.

Among the cases cited are Young v. Cenas, 1 N. S. 303, in which Martin, J., held "that a party not injured can not appeal," "it forms no *res judicatum* against him."

Williams v. Trepagnier, 4 N. S. 342, Martin, J., said: "Appellant can not set up complaints which parties did not." 2 Rob. 341.

Henderson v. Cross, Garland, J., said: "The interest must be apparent on the record and pecuniary." In addition to this, that decision was not even referred to as in conflict with the case of Byerly v. Judges of Eighth District Court, 23 An. 768, before cited; this latter case contains no reference whatever to any authority.

It is a common and wise rule of this and all supreme courts to make special reference to cases overruled; it is necessary to preserve the harmony of the authorities.

That the case of Byerly, 23 An. 768, does not overrule that of Markey, Kaiser et al. is clear from the language used by the court without dissent in 24 An. 115, No. 2 of volume —. State ex rel. Byerly v. Walton, Wyly, J., decided February, 1872. This is the same case on its merits as was passed upon in 23 An. 768, November, 1871: "We think the judgment of the lower court erroneous. The relator discloses no interest to justify this litigation. Until he earns fees the city of New Orleans owes him nothing."

It is contended that Field's interest is established by the fact that the Warmoth board has acted and counted him out, and that the title to the office is thereby denied to him.

The fifty-fourth section of the old law creating the original board, approved March 16, 1870, provides that "the returns thus made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil offices until set aside after a contest according to law of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected."

His rights under this act on the merits are clearly open to vindication through the proper process, and he can have no direct pecuniary interest in this contest unless we presume what the laws forbids, that this board committed frauds; the proof of which could only be made on trial of the merits and the frauds must be of such a character as to cause his defeat. Under any view taken of the case we should not go beyond a remandment to the lower court for trial on its merits.

It is also urged that the action of the board in making the count and returns is final. The statute itself forbids this conclusion, making them, as quoted above, only *prima facie* evidence. But suppose the statute itself to have made special provision that the returns should be final. We should be obliged to notice its conflict with article 73 of the constitution and declare it null and void.

That article provides that: "The judicial power shall be vested in a Supreme Court, in district courts, in parish courts and in justices of the peace." The Legislature can not then invest the Returning Board with judicial powers, and all judicial acts by said board are null and void. They have no more power to create such a tribunal to exercise judicial powers than to create another branch of the Legislative department in violation of article 15 of the constitution.

Appellant further contends that his right of appeal is allowed without regard to any moneyed interest, as the suit is by the State to enforce laws. The judgment is peculiar. The petition does not pray for a judgment in favor of the State. The judge of his own volition gives one in exact terms for the State. It is a safe rule to give only what is asked for in the petition. This compels me to examine the statutes to ascertain what laws, if any, this suit is to enforce. If the original law creating this board, act No. 100, approved March 16, 1870, was in force, I am unable to perceive that its enforcement could be accomplished in this indirect proceeding.

But is not that law dead? I am clearly of the opinion that the act No. 98, approved November 20, 1872, has taken the place of all pre-existing election laws. The only argument advanced against this view is that at the time of the signing of this act the lower house of the General Assembly had ceased to exist, the terms of its members having expired November 4, 1872.

It would seem a sufficient answer to this, to say that the legislative department in this State consists of the House of Representatives and the Senate, and that the terms of a number of Senators had not expired on the twentieth November. Upon any theory there must have been left a fractional vitality in the legislative department.

Act 43 of the constitution of the State provided that all bills for raising revenue shall originate in the "House of Representatives." Is this a bill to raise revenue? There can be no such pretense. How do we know that it did not originate in the Senate? There is no evidence whatever in the record on the subject. If it did originate in the Senate, the Governor was able to send it back to the identical body in which it originated as required by the constitution, the terms of a large number of its members not having expired. Whenever the executive or legislative department has exercised a discretion granted in the constitution, the judicial department can not limit or control it by considerations outside of the constitution.

I find this doctrine no where more emphatically announced than in the decisions of the Supreme Court of Louisiana.

In 11 An. p. 308, *State v. Hufty*, the court say: "The second branch of our inquiry is, are there any restraints or limitations laid down elsewhere in the constitution which rendered the exercise of the power of removal by this address null and void? We say elsewhere in the constitution, because if the power is expressly granted, we disclaim the right to limit or control it by considerations outside of the constitution."

"We are not the makers but the expounders merely of the paramount law. We can not add one jot or tittle to its terms. We can not by glosses and interpretations subtract one particle from its substance. It would be rebellion in a judge to say that a plain and unqualified grant of power given by the constitution to a particular department was null, because he thought it was against common right."

The Governor's power to sign this law was "a plain unqualified grant of power given by the constitution" to the executive department of the government and is beyond our reach, no matter how unwise his act may have been or how disastrous its consequences.

To trespass upon his constitutional rights is to imperil the whole frame of our government.

The doctrine advanced by appellants is novel and without sanction in American jurisprudence. Its execution is fraught with such dangers as were doubtless foreseen by the law makers, and they preferred to give a continuous life to that department and not to increase the changes that were inevitable among its members by acts of God beyond their control. It is equally well settled that the discretion given by law to the Executive is not subject to abridgment by the

judiciary. Opinions of Attorney Generals, vol. 3, p. 471; vol. 1, 681; vol. 3, 281; vol. 9, 313; vol. 12, —.

The judicial department can only interpose to correct illegalities arising after the Executive's discretion has been exhausted. This doctrine is elementary in the history of our constitutional form of government. The preservation of the separate rights of each department has ever been regarded as fundamental in the government of all the States of the Union. The judicial department is not less interested in it for the maintenance of the rights of the legislative and executive departments than for its own self-preservation.

The last clause of this act, section 71 reads: "That this act shall take effect from and after its passage and that all other laws on the subject of election laws be and are hereby repealed."

This clause sweeps out of existence all other laws on the same subject matter; it contemplates no revision nor modification; is absolute, unconditional, from its letter, designedly exceptional.

Its wisdom and the consequences to flow from it are not matters within our jurisdiction to determine.

When parties are deprived of constitutional rights by reason of its provisions they will vindicate those rights through the regular channels.

An emphatic indorsement of this view is contained in the case of the State of Louisiana ex rel. Board of School Directors v. the Mayor and Administrators (23 An. 358) of New Orleans, Justice Howell delivering the judgment of this court without dissent:

"Although judges are not to be controlled in their action by a consideration of consequences, we are unable to see the disastrous consequences which seem to be apprehended by counsel from the operation of this law."

It is also contended, that conceding the authority of the Governor to sign this act, it can not operate a removal of the Lynch board, because article 122 of the State constitution provides that all officers "shall continue to discharge the duties of their offices until their successors shall have been inducted into office."

How does this provision apply to this case?

This question is definitely settled by the case of State ex rel. Joseph L. Montieu v. Ursin Lavigne, 23 An. p. 111, decided February, 1871, without dissent. Wyly, J., the organ of the court, says: "The question is, was that part of the act creating the office of tax collector repealed by the act of twenty-first of October, 1868, 'An Act to provide a revenue to support the State government and the manner of collecting the same.'"

This act provides for the appointment of an assessor and defines his duties; it also provides, section 44, that the assessor in each and every

parish shall collect the State and parish taxes of his parish; and by section 78, "all laws or parts of laws contrary to the provisions of this act are repealed."

A fair interpretation of the law leads us to the conclusion that the office created by the act of 1864, and claimed by the respondent is abolished by the sections of the revenue act of 1868 to which we have referred.

Of course the term for which this officer was to hold did not continue after the repeal of the law creating the office; for it would be absurd to say there is an unexpired term to an office that has ceased to exist.

The repealing clause of this act, approved March 16, 1870, acts 1870, p. 152, No. 68, is in these words: "That all laws or parts of laws on the subject of raising revenue or the administration of the same contrary to or inconsistent with this act be and the same are hereby repealed."

The repealing clause, section 71 of the act November 20, 1872, is in these words: "That this act shall take effect from and after its passage and that all other laws on the subject of election laws be and are hereby repealed."

This repealing clause is exceptionally sweeping; that of the act of 1870 repealed only all laws contrary to or inconsistent with it, this repeals all other laws on the subject of elections; as before said, it is absolute, unconditional.

This court properly decided in 23 An. 111, cited above, that it would be absurd "to say there is an unexpired term of an office which had ceased to exist."

Consequences can not be considered by judges.

In the case of *Craig et al. v. The State of Missouri*, 4 Peters 410, Marshall, Chief Justice, the organ of the court said (p. 437): "In the argument we have been reminded by one side of the dignity of a sovereign State; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we can not misunderstand.

"To this admonition we can only answer, that if the exercise of that jurisdiction which has been imposed upon us by the laws of the United States shall be calculated to bring on those dangers which have been indicated, or if it shall be indispensable to the preservation of the Union and consequently of the independence and liberty of these States, these are considerations which address themselves to those departments, which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread

only that path which is marked out by duty." This was a *cause célèbre* in the Supreme Court of the United States.

The doctrine announced by this court that the signing of a new act repealing an old is sanctioned by numberless authorities. The passage of statutes in the States and by Congress has repeatedly found courts acting under former laws, and struck them out of existence with cases half tried, and annulled all proceedings at the date of the passage of the act not completed, and has turned the worst criminals loose. 9 Howard 571. Potter's Darris on Statutes and Constitutions, pp. 158, 160.

In 5 Wallace, p. 541, Insurance Company v. Ritchie, Chase, Chief Justice, said: "It is clear that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction. And it is equally clear that where a jurisdiction conferred by a statute is prohibited by a subsequent statute, the prohibition is so far a repeal of the statute conferring the jurisdiction."

The well known case of *ex parte McCardle*, 7 Wallace, 506, decided in 1868, Chase, Chief Justice, the organ of the court, is perhaps stronger on this point than any preceding case. He says: "What then is the effect of the repealing act upon the case before us? We can not doubt as to this. Without jurisdiction the court can not proceed at all in any cause."

As to this, jurisdiction is the power to declare the law, and when it ceases to exist the only function remaining to the court is that of announcing the fact and dismissing the cause.

"The general rule, supported by the best elementary writers, is that when an act of the Legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." He cited Darris on statutes, 538; 13 How. 429; 5 Wall. 541. "It is quite clear, therefore, that the court can not proceed to pronounce judgment in this case, for it has no longer a jurisdiction of the appeal, and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the constitution and the laws confer. And this is not less upon authority than upon principle."

If an act of Congress can destroy the power of the Supreme Court of the United States to complete the trial of a half completed case, I am unable to perceive why an act of the Legislature of Louisiana has not the power to prevent the completion by a returning board of its own creation, of any acts incomplete at the date of its passage.

But it is urged that act No. 98 of 1872 did not vacate the offices of the returning board created by act No. 00 of 1870, because the number of the board remains the same in the new as under the old law and their duties are the same, that the offices are identical. This is a serious mistake of fact.

Section 2 of act No. 98 takes the place of section 54 in the act of 1870. Its provisions are essentially different. The law of 1870 constituted the Governor, Lieutenant Governor, Secretary of State, T. C. Anderson and John Lynch the board. The law of 1872 provides that five persons, to be elected by the Senate from all political parties, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum and have power to make returns of all elections. Under the law of 1872 the election was to be held at every meeting of the Senate; under the old law Anderson and Lynch were permanent members and the other three were members as long as they remained Governor, Lieutenant Governor and Secretary of State.

The titles of the two acts differ materially. If the title of the act No. 98, 1872, were substituted for the title of the act No. 100, 1870, several provisions in the act of 1870 would be inoperative as conflicting with that provision of the constitution which requires the title of the act to express the object of its provisions. The two acts are radically different. An important and marked difference is in the provision requiring the board under the last act, that of 1872, to be composed of members of all different political parties.

It was specially inserted to prevent an abuse which at the date of the passage of the act was notorious in this State and throughout the whole country. The want of identity in the two laws is apparent on their face.

We are to consider the facts as they were at the institution of this suit in the lower court. Then the Warmoth board were acting as the Returning Board; they are the defendants in that suit, and if an appeal had been taken by the party cast after the decision of that suit by Judge Dibble they would have been appellants in this court. The last order in the Eighth District Court prior to the intervention, which resulted in this appeal, was one dismissing the Lynch board suit. The Returning Board that was inducted into office at the beginning of the suit continued in office until removed by the order of the United States Circuit Court. It is my opinion that the board thus inducted are not entitled to invoke this article of the constitution of Louisiana. It was inserted in the constitution to regulate changes in office caused by the changes in State laws and appointments and removals by State authorities. To recognize the right of the United States government thus indirectly to settle the title to all offices in the State would unsettle the whole jurisprudence of the State and of the general government itself. Neither the letter nor spirit of the enforcement act justify such an interpretation. It is without precedent.

I am unable to see the disastrous consequences to flow from this new election law, and if I did see them, courts are powerless under the

settled jurisprudence of this State and the whole country to avert them. 9 An. 562; 8 An. 341.

Our duty is to interpret existing laws, not to remedy defective laws; that is the province of the legislative branch of the government.

This view disposes of the point pressed in argument in this case as to consequences of dismissing this appeal.

There are other legal grounds set up for the dismissal of the appeal which it is unnecessary to notice.

ON THE MERITS.

I have but little to say on the merits, believing that upon this appeal we have no more authority to consider the merits than to have taken original jurisdiction.

The evidence in the record consists only of *ex parte* affidavits; no witness was cross-examined and these depositions were filed upon the issuance of the rule *nisi*. Neither the judge *a quo*, nor the plaintiffs, nor their attorneys seem to have regarded them as intended for a trial on the merits of the question of their own title to office. The majority of this court have decided to use them to determine the question of title to an office in no manner connected with the title of the members of the board. Field uses by this decision evidence previously unknown to him and his witnesses have to undergo no cross-examination.

A matter of fact apparent on the face of the transcript is that there was no trial on the merits in the court *a qua*. This, then, is the original trial on the merits: This court has no original jurisdiction except in habeas corpus cases. How can we safely deduce a conclusion from these affidavits? The witnesses testified for a particular purpose. The court applies the evidence to a different question. *Non constat* that this testimony would have been the same on the trial of the merits, as cross-examination might have reconciled all contradictions.

Without analyzing the affidavits in detail, suffice it to say, that under article 906 of the Code of Practice, which provides, "but if the court shall think it not possible to pronounce definitely on the cause in the state in which it is, either because the parties have failed to adduce necessary testimony or because the inferior court refuse to receive it or otherwise, it may, according to circumstances, remand the cause to the lower court with instructions as to the testimony which it shall receive to the end that it may decide according to law," the case, in my opinion, should be remanded, if not dismissed for want of jurisdiction. 6 N. S. 319; 6 N. S. 635.

In the case of *Merchants' Insurance Company v. Barroso, Carleton, J.*, said: "We do not feel altogether satisfied, therefore, to pronounce definitely upon the point in question in the present state of the proceedings, but think the case should be sent back for further proceed-

State ex rel. Attorney General v. Wharton et als.

ings, upon both the law and the facts of the case." See numerous cases cited under article 906, Fuqua's Code of Practice.

If this caution is the established rule where there is other than *prima facie* evidence in the record, *a fortiori*, it should not be deviated from where the record contains only *prima facie* evidence.

No. 4077.

CHOPPIN & WHITE v. BLANC & LEGENDRE.

Where judgment *in solido* being rendered against Wallace & Choppin with vendor's privilege on a certain lot of machinery sequestered in the hands of said firm, but released on bond, and after release sold to Choppin & White, successors to the former, an appeal was granted to Wallace and Choppin and no bond was given by said firm, but by Choppin alone for a suspensive appeal; and pending the appeal, the parties who had obtained judgment against Wallace & Choppin issued execution and seized the property released on bond as aforesaid, which execution was enjoined by Choppin & White;

Held—That, in answer to the injunction suit, no averment or proof of simulation having been made, the party in possession under a title could not be proceeded against in this indirect manner.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. S. P. Blanc*, for defendants and appellants. *B. R. Forman*, for plaintiffs and appellees.

Justices concurring: Howell, Wyly, Kennard, Taliaferro.

TALIAFERRO, J. The defendants in this injunction suit being holders of a promissory note given by Wallace & Choppin to Ivens & Co. in part consideration for a lot of machinery purchased by them, brought suit on the note and sequestered the machinery claiming to be subrogated to the vendor's privilege upon it. The property sequestered was released on bond. It seems that after the release, the machinery was sold to Choppin & White the present plaintiffs. The suit brought against Wallace & Choppin by the defendants was brought against the partnership and individually also against each of the persons composing the firm.

Judgment was rendered against them *in solido* with vendor's privilege on the property sequestered. An appeal was granted on motion, to the firm of Wallace & Choppin; but no bond was given by the firm. Choppin, one of the firm gave bond individually for a suspensive appeal; and pending this appeal, Blanc & Legendre issued execution and seized the machinery and caused it to be advertised for sale. Choppin & White thereupon obtained an injunction to stay the proceedings. On trial of the injunction in the court below the injunction was perpetuated but without damages. From this judgment the defendants have appealed. The defendants in injunction contend that the property seized is partnership property, and as the partnership has not prosecuted its appeal, the appeal alone and individually of Chop-

 Choppin & White v. Blanc & Legendre.

pin does not bar the defendants from proceeding against the partnership property.

The evidence shows that after the release of the sequestration under bond the property seized was sold to Choppin & White; there is no allegation set up in answer to the injunction suit that this sale was a simulation. The party in possession under a title, can not be proceeded against in this indirect manner, no averment or proof being made of simulation.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

 No. 3826.

MRS. S. MOUSSIER AND WIDOW A. COURCELLE v. F. W. GUSTINE and
C. S. SAUVINET, Sheriff.

An appeal will not be dismissed because the surety on the appeal bond was surety on the injunction bond.

If the bond of appeal fixed by the judge *a quo* is insufficient for a suspensive, it suffices for a devolutive appeal.

A married woman can not be sued on the ground that, being shown to be the keeper of a boarding house and therefore a public merchant, no authorization is necessary either from her husband or the court.

Articles 121 and 131 of the Civil Code can not be construed to warrant the conclusion that the carrying on of any other business by a married woman than that of merchandise constitutes her a public merchant.

The words "separate trade" in the latter clause of article 131 of the Civil Code, declaring that the wife "is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband," refer clearly to the trade in merchandise and not to any other business or pursuit.

When by the terms and conditions of a lease two lessees are bound *in solido*, a judgment from the court *a qua* against them *jointly* will be set aside, and if the judgment against one of the parties to the lease never had any legal force it remains in full force against the other.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. B. R. Forman*, for plaintiffs and appellants. *Randolph, Singleton & Browne*, for defendants and appellees.

ON MOTION TO DISMISS THE APPEAL.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Howe.

WYLY, J. The plaintiffs enjoined the execution of a judgment against them for \$1850. The injunction was dissolved with twenty per cent. damages and they have appealed.

The defendants move to dismiss the appeal because the bond is not sufficient in amount; because the surety on the appeal bond is the same person who was surety on the injunction bond, and because the latter is not made party to the appeal.

Mrs. S. Moussier and Widow A. Courcelle v. Gustine and Sauvinet, Sheriff.

The appeal was taken by motion and the appeal bond is in favor of the clerk. All parties are therefore before the court.

The appeal bond being for \$2000 is ample for a suspensive appeal.

The injunction bond was given to protect the defendants from damages resulting from the injunction, the amount of which decreed by the court is only \$370.

That the surety on the injunction bond is the security on the appeal bond is of no consequence; he was not condemned to pay anything and he is not an appellant. 12 La. 383; 2 R. 235.

The motion is therefore denied.

ON THE MERITS.

Justices concurring: Ludeling, Taliaferro and Howe.

TALIAFERRO, J. There is a motion to dismiss the appeal in this case on the following grounds:

First—That the surety on the appeal bond was surety on the injunction bond.

Second—That the amount of the appeal bond is insufficient, being only for \$2000 when it should have been for a much larger sum; the execution enjoined was for \$1850, with interest and costs.

The first ground is untenable. 2 Rob. 235.

The amount of the bond was fixed by the judge. If insufficient for a suspensive it suffices for a devolutive appeal. 20 An. 340; 21 An. 597.

In this action the plaintiffs, who are sisters, one of them a married woman, the other a widow, injoin an execution issued against them on a judgment obtained by Gustine, the defendant in injunction, for the sum of \$1850, with interest, and also sue to have that judgment annulled on the ground: *First*—That the judgment was obtained against Mrs. Moussier, a married woman, without any authorization having been given to her by her husband or the judge to appear in court. That the judgment therefore as to her is null. *Second*—The judgment being joint, it is null as to Mrs. Courcelle, who was sued as a joint obligor with her sister. The article 2080 (2085) declares: "No judgment can be obtained against any joint obligor unless it be proved that all joined in the obligation." The absolute incapacity of Mrs. Moussier to appear in court rendering the judgment as to her null, no judgment could be rendered against the other party. *Third*—That the judgment was rendered by agreement of the parties on the confession of the two plaintiffs, on the express condition that it was not to be executed against them, having been obtained merely for the purpose of keeping off creditors for small amounts who might cause

Mrs. S. Moussier and Widow A. Courcelle v. Gustine and Sauvinet, Sheriff.

annoyance to both Gustine, the creditor, and the two plaintiffs here defendants in the consent judgment.

There was judgment in the court below dissolving the injunction, with twenty per cent. damages, and rendering judgment against the plaintiffs, rejecting their claim to annul the judgment.

The plaintiffs have appealed.

The facts are that these plaintiffs leased property from the defendant Gustine, and were in arrears with him to a considerable amount. An arrangement was entered into through an attorney by which the parties indebted on their lease were to confess a judgment in favor of their lessor who was not to execute it, but hold it in check over creditors for small sums, who were by means of judgments obtained in courts of justices of the peace frequently annoying the plaintiffs by seizures for small debts, while at the same time he made his own debt secure. It is shown that Mrs. Moussier has a husband who has been absent several years in Brazil. This fact is fully proved. No authorization whatever is shown for her to appear in court. The judge *a quo* proceeded to render judgment against her on the ground that, being shown to be the keeper of a boarding house, and therefore a public merchant, no authorization was necessary either from her husband or the court. We do not think that articles 121 and 131 of the Civil Code can be construed to warrant the conclusion that the carrying on of any other business by a married woman than that of merchandise constitutes her a public merchant. The latter clause of article 131 declares that the wife "is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband." The "separate trade" here spoken of, we think, refers clearly to the trade in merchandise and not to any other business or pursuit.

By the terms and conditions of the lease the lessees (the two plaintiffs) were bound *in solido*. The judgment they seek now to annul never had any legal force against Mrs. Moussier for the reasons stated. But it remains in force against Mrs. Courcelle.

It is therefore ordered that the judgment appealed from be annulled and set aside. It is ordered further that the judgment which the plaintiffs pray in this suit to have annulled be and the same is hereby decreed null and void as to Mrs. Moussier, and that it be maintained for the whole against Mrs. Courcelle. It is further ordered that the injunction be perpetuated as to Mrs. Moussier, with costs in the lower court; and that it be dissolved as to Mrs. Courcelle, with ten per cent. damages on the amount enjoined, which are hereby decreed against Mrs. Courcelle and her sureties on the injunction bond *in solido*, she paying all costs.

Rehearing refused.

No. 2030.

MOSES MARX v. NATIONAL MARINE AND FIRE INSURANCE COMPANY.

A river policy of insurance, No. 208, was executed in favor of A on the first of February 1867, according to all the forms prescribed by the charter and by-laws of the company. The insurance was "on account of whom it may concern, on such property *lost or not lost*, and in such sums, to and from *such ports or places*, and by such good and seaworthy steamboats or other river craft *as may be approved by the company and entered in the book attached to the policy*; it being expressly understood and agreed that no risk under this insurance is or shall be binding unless so approved and entered."

Subsequently, on the fourth of same month, A, under the open river policy No. 208, made a special application which was accepted, to have all merchandise shipped to him on the Ohio and Mississippi rivers and their navigable tributaries, covered without being *entered in the book attached to the policy*, the risk on any one boat being limited to \$5000, and he binding himself to report the shipment as soon as notice thereof was received by bill of lading or otherwise. On the ninth of April, A had an entry made in the book attached to his policy, by which merchandise shipped to him from *Montgomery on the Alabama river* was covered. The merchandise had been burned on the seventh of same month, but A had no knowledge of the fact at the time of the entry.

Held—That the entry was regularly made and within the terms of the open policy; that said policy authorized the risk from the port of Montgomery, on the Alabama river; and that the *special* application was an additional agreement containing certain stipulations, none of which modified the open policy so as to limit the risks to the *Ohio and Mississippi rivers and their navigable tributaries*.

Where the stipulation is that the property to be insured shall be covered *lost or not lost*, and no fraud has been established against the insured, the contract of insurance becomes operative and covers the property whether lost or not lost at the time of the entry.

A PPEAL from the Fifth District Court, Parish of Orleans. *Leaumont, J. H. B. Kelly*, for defendants and appellees. *John M. Bonner*, for plaintiff and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Kenuard.

WYLY, J. The plaintiff sues the National Marine and Fire Insurance Company for \$2232, alleging that he holds their open river policy of insurance No. 203, issued on first day of February, 1867; that on the third of April following his agents shipped from Montgomery, Alabama, to New Orleans, on the steamboat "Benefit," a lot of merchandise belonging to him; that he received the invoices on the sixth, and on the ninth of April he presented them at the office and to the proper officer or agent of said company, in order to have the insurance entered in the book annexed to said open policy, making the application in writing; thereupon the entry was made under the heading: *indorsements on open river policy No. 208.*" It mentioned the date, the thing, the name of the vessel, the place of shipment, the destination, the sum insured, the rate of insurance, and the amount of premium.

The plaintiff alleges that said steamboat Benefit was lost with his said merchandise, by fire, on the Alabama river, on the seventh of April, 1867, of which he first heard on the evening of the ninth after said entry had been made on said policy.

He further alleges that he notified the company and demanded settlement, which was refused. He therefore sues for the amount of the insurance. After pleading the general issue, the defendants admit

the execution of the open river policy of insurance No. 208, but aver that the risks to be covered thereby are, by the express terms of the instrument, limited to the Mississippi and Ohio rivers and their navigable tributaries. They deny that they ever entered into any contract of insurance with the plaintiff, covering risks on the Alabama river, where the loss occurred, for which the plaintiff seeks to hold them liable. They admit that the plaintiff, on the ninth of April, 1867, made application to a clerk in their office to have certain merchandise on board the steamboat "Benefit," at and from Montgomery, Alabama, entered upon said open river policy, but they aver that he had no right to claim said entry on said policy, as said application was not in conformity to and accordance with the terms of said policy; that it was outside of its stipulations and involved a new and different contract of insurance, to which they deny the company ever became a party or acceded to by any of its officers authorized by the charter to make contracts, take risks, or make or modify the policies of insurance. They further aver that prior to said application said steamboat "Benefit," with the said merchandise on board, had been destroyed by fire and that the plaintiff had received intelligence thereof, as had also the officers of the company authorized to take risks and make policies of insurance.

They aver that the entry made of said merchandise on said policy of insurance was procured by said Marx's fraudulently cancelling and withholding from the clerk who made the entry, at his instance, the fact well known to said Marx, that said policy did not extend to or cover risks on the Alabama river. They also aver that the entry was made by the clerk on the erroneous supposition that the application corresponded with the terms of the policy which it did not. And they specially deny that the clerk had authority to bind the company by any entry outside of the express terms of the policy.

The court dismissed, as of nonsuit, the demand of the plaintiff, and he has appealed. The question is, was the entry of the ninth of April on the open policy No. 208, made in conformity with the terms of said policy? Was it outside of its stipulations, involving a new contract, which the clerk had no authority to make? In the open policy we find the following clause: "This insurance is declared to be on such property, in such sums, to and from such ports or places, and by such good and seaworthy steamboats, or other river craft, as may be approved by this company and entered in the book attached to this policy. It being expressly understood and agreed, that no risk under this insurance is, or shall be, binding until so approved and entered."

We are of the opinion that the entry was within the terms of the policy and that the risk became binding on the company from the date of the entry.

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Under the open policy No. 208, the insurance became complete on such property "to and from such ports or places" as may be approved by the company and "entered in the book attached to this policy." The entry was regularly made; and the open policy authorized the risk from the port of Montgomery, Alabama, because under it an entry could be made from any post or place.

It is not denied that the clerk had authority to make the entry, if it fell within the terms of the policy. Besides a witness of the defendants states that all the entries were made by clerks in the office prior to the ninth April, and they were properly made; among these entries or indorsements, we notice several on the Alabama river.

But the defendants refer to the river application under open policy No. 208 to show that said policy was limited to shipments on the Mississippi and Ohio rivers and their tributaries; and that it did not cover risks on the Alabama river.

This river application was signed by the plaintiff and the secretary of the company on the fourth of February, 1867. It was intended to cover all shipments, belonging to whom it may concern, addressed to the assured on board any seaworthy vessel on the Mississippi and Ohio rivers and their tributaries, provided the risk by any one boat shall not exceed \$5000; and it also stipulated that the assured shall give prompt notice of every shipment as soon as notified thereof by bill of lading or otherwise. In this river application of fourth February, 1867, we do not find the limitation insisted on by the defendants. It simply modifies the original contract so far as relates to consignments to the plaintiff on the Mississippi and Ohio rivers and their tributaries, by stipulating that the risk on no boat shall exceed \$5000, and that the risk shall take effect from the date of shipment, instead of the date of entry or indorsement on the open policy.

Under this application all consignments, on rivers named, were insured from the date of shipment. Without it the risk would only attach from the date of entry or indorsement on the open policy No. 208. It is true this river application does not extend to the Alabama river; but the plaintiff does not seek to hold the defendants liable under it. Their liability is claimed from the date of the entry or indorsement which was made pursuant to the express stipulation in open policy No. 208, that the insurance shall attach from the date of entry "on such property, in such sums, to and from such posts or places," as may be approved by the company "and entered in the book attached to this policy." The open policy covers all shipments from the date of the entry contemplated, and there is nothing in the river application in question limiting this stipulation in the original contract of insurance. It is merely an additional agreement by which insurance, on certain rivers, and to certain amounts, might at once be

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operative without indorsement or entry in the book annexed to open policy No. 208. The only remaining question is, can the insurers be held liable when it appears that the loss had occurred before the entry or indorsement on the open policy, and of this fact they were, at the time, aware?

No fraud has been established against the assured. He seems to have acted in good faith and had no knowledge, when he applied for the entry, that the loss had occurred on the Alabama river two days before. In the open river policy No. 208 we find a stipulation that the property to be insured shall be covered, lost or not lost. No risk, however, was to be binding till approved and entered. When this was done the contract of insurance became operative and it covered the property whether lost or not at the time of the indorsement.

We have shown that the clerk had authority to make the entry or indorsement because it was within the terms of the open policy. Thereafter the insurance was complete. The amount of the loss is not disputed. The plaintiff should therefore have judgment for the amount claimed, less \$27 90, the amount of the premium.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the plaintiff have judgment against the defendants for two thousand two hundred and thirty-two dollars with legal interest from judicial demand, less twenty-seven dollars and ninety cents, the amount of premium.

It is further ordered that the defendants pay costs of both courts.

No. 2833.

STATE OF LOUISIANA ex rel. A. A. PLATTSMIER v. J. O. LANDRY,
Controller, and al., CITY OF NEW ORLEANS.

The facts and law in this case are identical with those in the case of State of Louisiana ex rel. G. W. Saddler v. J. O. Landry and al., city of New Orleans, except that in this case the plaintiff is a constable instead of a justice of the peace.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Brice & Mitchell*, for plaintiff and appellee. *J. R. Beckwith*, for relator and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Kennard.

KENNARD, J. The facts and law in this case are identical with those in the case of State of Louisiana ex rel. George W. Saddler, appellee v. J. O. Landry et al. City of New Orleans, appellant, except that in this case the plaintiff is a constable instead of a justice of the peace.

For the reasons assigned in that case it is ordered that the judgment of the lower court be reversed and the mandamus denied, with costs to be paid by relator.

State ex rel. Newgass v. Friedlander.

No. 4445.

STATE OF LOUISIANA ex rel. H. NEWGASS v. S. FRIEDLANDER, President of New Orleans Sanitary and Fertilizing Company.

Where a suit is by a stockholder of a company to compel the officers to permit him to examine the books of the company, and there is no amount in dispute which could give the court jurisdiction, the appeal will be dismissed.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Hornor & Benedict*, for relator and appellee. *Lacey & Butler*, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro, Howell and Kennard.

LUDELING, C. J. A motion has been made in this case to dismiss the appeal for want of jurisdiction.

The suit is by a stockholder of the company to compel the officers to permit him to examine the books of the company. There is no amount in dispute which could give this court jurisdiction. 24 An. 148; art. 74 of the constitution.

It is therefore ordered that the appeal be dismissed with costs.

No. 2624.

CRESCENT CITY BANK v. JOSEPH HERNANDEZ.

Where a power of attorney is given to an agent "to make checks and draw money out of any bank or banks wherein the same may have been deposited in the name or for account of the principal," the fact that a sufficient amount to meet the check was not deposited when the check was drawn is not a valid defense, and does not authorize the principal to refuse paying it in the hands of a party who had no notice of the prohibition put upon the agent.

Where A gives an accommodation check to B in exchange for B's check, the fact that B's check is not paid, does not release A from the liabilities attaching to his own check as soon as it is received by an innocent third party as cash.

The rights which become vested when a check is deposited can not be prejudiced by what happens after that time between the original parties.

There is no reason why a deposit to the credit of an overdrawn account should not be fully as legal and unsuspecting as one on an account already credited with a balance. The discovery of an overdraft is the strongest possible incentive to an early deposit to make the account good.

It is better that the immediate employer and principal of an agent should suffer by the imprudence of his employe than that third parties should suffer from those acts of agents which are recognized by the public as valid, because of the confidence reposed in the principal.

Where an agent issues a commercial obligation authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration which has actually accrued to the benefit of his principal, and that, therefore, the principal is bound by it; and third parties who, acting on the presumption, receive such negotiable obligations, are protected against the equities of which they have no notice.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Albert Voorhies*, attorney for plaintiff and appellee. *Semmes & Mott*, for defendant and appellant.

Justices concurring: Taliaferro, Howell, Wyly and Kennard.

KENNARD, J. The Crescent City Bank, plaintiff, sues the defendant

Joseph Hernandez, upon his check on the Germania National Bank of New Orleans for the sum of two thousand five hundred and fifteen dollars and seventy-five cents, dated New Orleans, November 11, 1869, drawn by J. Hernandez, per M. F. Bonis, to the order of Huger & Bein and by them indorsed: "For deposit, Huger & Bein, per R. E. Wheeler."

The plaintiff received this check from Huger & Bein, their depositors, in regular course of business and entered it in their bank book as so much cash on the morning of November 12, 1869.

The defendant Hernandez, through his agent M. F. Bonis, had, as a matter of accommodation, given this check on the afternoon of November 11, after bank hours, to Huger & Bein in exchange for their check, dated one day ahead, to wit, November 12. This check was drawn on the Crescent City Bank, the plaintiff. Hernandez, the defendant, presented the check received by him to the Crescent City Bank on the twelfth, before his check, the one in suit, was presented to the Germania Bank for payment in the regular course of bank exchanges. The check drawn by Huger & Bein being refused payment, Hernandez immediately notified the Germania Bank not to pay his check, drawn November 11, 1869, in favor of Huger & Bein.

The court *a qua* gave judgment against Hernandez and he has appealed.

The grounds of his defense are—

First—That the check was drawn without authority by M. F. Bonis on the Germania National Bank at a time when he had no funds to his credit in said bank, nor had he any funds on deposit there between the drawing of the check and its presentation for payment; that said Bonis was not authorized to draw accommodation checks on banks where no funds were deposited to the credit of respondent, or checks for larger sums than the amount at the time on deposit.

Second—That plaintiff is not "a bona fide" holder for value; that Huger & Bein obtained possession of said check with full knowledge that Bonis was not authorized to draw said check, through fraud and false representations and without consideration; that it was deposited with plaintiff as the agent of Huger & Bein for collection.

Third—That when the deposit was made by Huger & Bein the Crescent City Bank well knew that the account of Huger & Bein in said bank was largely overdrawn and so continued to be up to the institution of this suit; that at the time of such deposit plaintiff paid no consideration therefor and has never given any new credit thereon, and that plaintiff was notified by M. F. Bonis prior to the time when the check sued on was presented for payment to the Germania Bank.

The authority exercised by M. F. Bonis, agent of Hernandez, in drawing the check in question must be measured by the terms of the

procuration under which he acted. It is unusually full and contains the following clause: "Giving and granting unto him, said attorney, full power and authority for him, and in his name and behalf and to his use to manage and transact all and singular his business and affairs in this city, to open all letters of correspondence addressed to said appearer and to answer the same, to make checks and draw money out of any bank or banks wherein the same may have been deposited in the name or for account of said appearer."

The answer of defendant and the character of the evidence shows conclusively that he would not have expected a release from the payment of his check, had there been funds to meet it on deposit in the Germania Bank at the time when the check was drawn, the agent's authority to draw checks being unrestricted in the power of attorney so far as funds on deposit are concerned.

Is the fact that a sufficient amount to meet the check, was not on deposit when the check was drawn, a valid defense to its payment in the hands of a party who had no notice of the prohibition put upon the agent?

Can the default made by Huger & Bein, with reference to their check given in exchange for this, operate a release from the liabilities attaching to defendant as soon as his check was received by an innocent third party as cash?

This check was entered in the bank book of Huger & Bein as cash. Immediately upon its entry, Huger & Bein were authorized to check against it and the evidence shows that by one o'clock on the twelfth they had exhausted their deposit including this check. The consideration given by the Crescent City Bank was then the face value of the check in cash.

The proof is that seven exchanges of checks similar to this had been previously made between these parties, a course of dealing well calculated to remove any doubts that might have been entertained by the plaintiff as to the regularity of this check.

The second ground of defense that Huger & Bein obtained their possession with full knowledge that Bonis was not authorized to draw it, if true, can not prejudice the rights of a third holder who is neither alleged nor proven to have had such knowledge.

The allegations, if proven, that the Crescent City Bank knew that the account of Huger & Bein was largely overdrawn when this check was deposited, and so continued to be up to the institution of this suit, that no new credit was given on account thereof, and that plaintiff was notified prior to the presentation of the check for payments, can not avail the defendant. Plaintiff's rights vested when the check was deposited, what happened after that time between the original parties can not prejudice those rights. We see no reason why a de-

posit to the credit of an overdrawn account is not fully as legal and unsuspicious as one to an account already credited with a balance.

The discovery of an overdraft is the strongest possible incentive to an early deposit to make the account good.

It is contended that to validate checks thus drawn when there are not funds on deposit to meet them, is to authorize an agent to use his principal's credit instead of his cash. That the agent will thereby be left without restraint and may at will ruin his principal, and the case of *Baines v. Ewing*, volume 1 Law Reports Exchequer for 1866, p. 320, is cited as sustaining this view.

In that case the agent was authorized in the name of his principal to underwrite policies against marine risks in Liverpool not exceeding £100 by any one vessel. He exceeded his authority by underwriting a policy for £150, and the court held the principal to have been released, but the reason assigned by the court destroys the analogy to this case.

The organ of the court says: "The plaintiff was not aware that the broker's authority was limited to any particular sum, but it was notorious in Liverpool that in nearly all cases there is a limit of some sort which remains undisclosed to third persons imposed on brokers by their principals."

Baron Martin, concurring, adds: "But then it is said we must hold him to have had authority because of the exigencies and course of business at Liverpool. It appears, however, that it was well known there that a limit is almost always, if not always, put to the amount for which a broker may underwrite."

Banks see fit to treat their good credit as increasing the amount of their cash on deposit, and we see no good reason why innocent third parties should be held responsible for entertaining the same confidence in a good signature.

We think this view not only consonant with sound law but essential to banks themselves and commercial interests generally. It is better that the immediate employer and principal of an agent should suffer by the imprudence of his employe than that third parties should suffer from those acts of agents, which are recognized by the public as valid, because of the confidence reposed in the principal.

The reasons assigned by the learned judge *a quo* are cogent and satisfactory. For those reasons and the reasons herein assigned the judgment is affirmed.

The Supreme Court having assigned among the reasons for their judgment those given by the judge *a quo*, it is deemed proper to report his decision.—REPORTER.

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parish of Orleans. Collens, J. The defendant is a stock, money and exchange broker; M. F. Bonis is defendant's principal clerk, and has also been constituted his agent by authentic act passed before S. Magner, Esq., notary public. This power given by this act is very extensive. It gives, generally, authority to manage and transact all and singular the constituent's business in this city, and specially to make deposits and draw checks, "to sell stocks," etc., to receive and pay moneys, "to make pawns and pledges," to make, give and renew notes, "to borrow money, adjust and settle all accounts," to compromise, compound, etc.

On one or more occasions Bonis had made friendly loans of Hernandez's funds to Huger & Bein, but Hernandez, on being informed of this, expressly forbade a repetition of this favor. Nevertheless, on the eleventh November, 1869, after bank hours, Bonis was prevailed upon to receive Huger & Bein's check on the Crescent City Bank for \$2515 75, payable next day, and in exchange to give Hernandez a check on the Germania Bank for a like sum, payable immediately; at the moment Bonis drew this check he knew that, though Hernandez had an account at the Germania Bank, the balance there to his credit amounted only to a few dollars, and he relied to make up the deficiency on Huger & Bein's check on the Crescent City Bank; also, on other promises and assurances of Huger & Bein, but these expectations were not realized. Huger & Bein deposited Hernandez's check in the Crescent City Bank as cash, and it was credited to them as cash, and therefore as customary of this right they availed themselves superabundantly and before the check drawn in favor of Hernandez was presented they had, by means of other checks, overdrawn their accounts. .

In the meantime, Bonis, for Hernandez, had made no deposit in the Germania Bank to meet the check he had drawn, so that when the plaintiff presented it for payment, it was refused and protested, and not only for want of funds, but also by express orders from Hernandez, who had become aware of the violation of his private instructions.

The question presented is whether Hernandez is liable to the Crescent City Bank on this check; he contends that the power to make checks is necessarily a limited power, that an agent having this power can bind his principal to the extent only of the amount of cash actually on deposit at the moment of drawing the check, for it is a power to draw against funds, and therefore it ceases when there are no funds, so that an agent who issues checks, when there is no deposit to meet them exceeds his power, and does not bind his principal. Defendant's counsel argue that an assignment, or appropriation of the deposit *pro tanto*, and therefore if there is no deposit or fund there can be no assignment made by the agent so as to affect the principal. They also

argue that a check is only a means of effecting a payment, and hence the power to make it does not give that of using the principal's credit by the issue of an indefinite number of checks on banks where no account, or no sufficient deposit is kept. They might have gone further and have asserted that the maxim that every man is limited; in every instance the agent is bound to use and apply the principal's moneys and other property only to that principal's affairs; the agent is forbidden by law from incumbering or alienating the property or expending the money, or engaging the credit of the principal for his, the agent's, own affairs or benefit, or to accommodate his own friends; any person taking an obligation from an agent as such in the transaction of business that does not concern the affairs of the principal, acquires no right of action against the principal; hence under the circumstances of this case, Huger & Bein would have no action against Hernandez on the check, not only because they had knowledge of the particular orders given to Bonis, but also because it was issued to them in a transaction which did not concern Hernandez or his business. They were parties to the contract itself that gave rise to the drawing of the check, and therefore liable to its ultimate equities.

But this suit is not one between original parties, but it is a controversy between a principal, sued by an innocent third party, on a written obligation contracted by an agent on behalf of that principal. The real question to be solved is whether the third party in such a case is affected by the abuse of power the agent has been guilty of in drawing a check, or by the equities between the principal and the drawee of the check.

There is a distinction in law between an abuse of power and an exceeding of power, committed by an agent. In the one case, the agent does some act within the descriptive terms of his mandate, some act which the mandate declares he shall have a right to do for his principal, but which he does really for his own benefit, or contrary to private instructions. These acts of abuse of power will bind the principal because they are covered by the terms of the mandate, unless the party dealing with the agent is aware of the agent's infidelity or gross sacrifice, or misuse of the principal's rights and property. Acts that exceed the power given—that is to say, those that are not of the kind or description mentioned in the mandate, are of no effect whatever against the principal; hence, if there had been no power given to Bonis in this mandate to draw checks, his having issued one would be in no manner binding on Hernandez; but there is such a power given, and though the agent may have committed an abuse of his authority, the law, in my opinion, renders the principal liable to a party innocent or ignorant of that abuse. Story on Agency, 126 et seq.

True it is, a check appropriates the amount to the holder of the

check; but the act of drawing a check by an agent authorized so to draw, authorizes the assumption that there are really funds on deposit, which may be so appropriated, and no one dealing with the agent for a check, is bound to make previous inquiry at the bank, any more than if he were dealing with the principal. If such an inquiry were necessary, the very facilities which checks were invented to procure would be defeated.

It is also true that a check is a means of effecting a payment and not a means of using credit; but because it is only a means of payment, says Chancellor Kent, (vol. 4, p. 549, Note 4th Ed.) the check is the acknowledgment of a certain sum due. Justice Sutherland, in *Murray v. Judah*, 6 Cowen, 490, also says, "Every check is *prima facie* presumed to be given for value received by the drawer." Now, Bonis was vested with ample authority to contract a debt for this principal to pay his principal's debts, to acknowledge an indebtedness for his principal, and to draw a check for the purpose, and the presumption arises in favor of his act.

Is the principal released on proof that the fact does not sustain the presumption, and that an abuse of authority was really committed?

The law answers negatively, whenever the check has in its temporary circulation come through the ordinary course of business into the hands of an innocent holder for value.

The rule governing bills of exchange in this respect is also applicable to checks.

Story on promissory notes, par. 488, says of "checks," where they are made payable to a particular person only, they are not negotiable; where they are payable to order *they are negotiable* by indorsement, and where they are payable to bearer they are negotiable by mere delivery.

In these respects they have the *precise qualities and effects* of bills of exchange. Kent, vol. 3, page 75, 4th ed., says of a check; "It is transferable like a bill of exchange;" and Strong, on promissory notes, page 491, says: "It is a well known rule of law that a bill of exchange, or a promissory note taken after the day of payment, or, as the common phrase is, when it is overdue, subjects the holder to all the equities attaching to it, in the hands of the party from whom he receives it." But this rule does not apply to a check, for it is not treated as overdue, although it is taken by the holder some days after its date, and it is payable on demand. On the contrary, the holder, in such a case, takes it, subject to no equities, of which he had not at the time notice, etc.

To sum up, when an agent issues a commercial obligation, authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration that has actually accrued to the benefit of

his principal, and that, therefore, the principal is bound by it; and third parties, who, acting on the presumption, receive such negotiable obligations are protected against the equities of which they have had no notice. 10 L. R., 567; 19 A. R., 183; Louisiana Code, 2971, 2972, 2990.

Judgment for plaintiff.

No. 3957.

CITY OF NEW ORLEANS v. J. STRAUSS. E. MERLE and J. CHAPUS,
Warrantors.

Where a certificate of indebtedness with the date and number wanting, was stolen, while being prepared for issuance, before it was issued and put in the market by the city of New Orleans, and after the date and number had been subsequently forged, was sold to the defendant, who called his vendor in warranty;

Held—That this instrument can not be classed as negotiable paper upon which the maker is bound to innocent holders. It is transferable, it is true, but the transferee obtains only the rights of the transferrer.

In this case the transferrers and warrantors had no legal possession of the certificate of indebtedness of which the city of New Orleans never ceased to be the owner.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard*, J. *George S. Lacey*, City Attorney, for plaintiff and appellee. *O. Roselius & Alfred Philips*, for defendant and appellant. *Hays & New*, for warrantors.

Justices present and concurring: Ludeling, Taliaferro, Howell and Kennard.

HOWELL, J. The city of New Orleans claims the sequestration and possession of a certain certificate of indebtedness in favor of J. Fallon or bearer for \$775 65, found in the possession of the defendant, Strauss, and alleged to have been stolen in a state of incompleteness from the office of the Administrator of Public Accounts. The defendant answered that he purchased said certificate in due course of business from E. Merle and J. Chapus, and it being a negotiable instrument his title as an innocent third holder is good. He called his vendors in warranty, whose answers are substantially a general denial, Chapus specially denying any connection with the matter. From a judgment in favor of the city and one against the warrantors *in solido*, in favor of defendant, the parties cast have appealed.

The evidence satisfies us that the "certificate" was stolen from the office of the Administrator of Public Accounts, before it was in a state or form to be issued, and that the deficiencies were supplied before the sale to defendant on the same day of the theft. But we can not class this instrument as negotiable commercial paper, upon which the maker is bound to innocent third holders. It is transferable, it is true, but the transferee obtains only the rights of the transferrer. See the

case of the State ex rel. S. Smith & Co. v. James Graham, Auditor, recently decided. Strauss obtained no title, and the city was correctly held to be the owner.

We concur in the opinion of the judge *a quo* that the warrantors have not shown a legal possession of the certificate, and that they must be condemned to pay to Strauss the amount paid by him to them for the certificate.

Judgment affirmed.

Rehearing refused.

No. 4075.

ALVA M. HOLBROOK v. JENNIE BRONSON, his wife.

Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice.

It can not be contended on her behalf that, inasmuch as, when the judgment was rendered and notice thereof served at her domicile, she was absent, or had gone out of the parish, it was necessary to appoint an attorney upon whom service of the notice of judgment should have been made.

Article 141 R. C. C. is to be construed as applying to the defendant who is absent, or incapable of acting, at the institution of the suit, and can not be cited in the usual way, but not to one who is legally and regularly a party to a suit and who voluntarily declines making a defense or temporarily leaves the place of the jurisdiction after being cited. The jurisdiction of the court can not thus be defeated.

The appointment of persons to represent parties to a suit should be made with caution and in cases clearly designated.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Semmes & Mott*, for plaintiff and appellee. *J. B. Howard*, for defendant and appellant.

Justices concurring: Howell, Wyly, Kennard.

HOWELL, J. A motion is made to dismiss this appeal on the ground, among others, that when it was taken, the delay within which appeals are by law allowable in this class of cases, had expired.

The suit was instituted for a divorce. The defendant, upon the prayer of the plaintiff, was authorized to defend it, and a domicile (her usual residence No. 208 Constance street) was assigned to her during the pendency of the proceedings; personal service of the petition and citation was made on her; after the legal delays, no answer being filed, default was taken and duly confirmed in favor of plaintiff; notice of final judgment was served on defendant on twenty-ninth January, 1872, by leaving the same (in the language of the return) at her domicile, No. 208 Constance street, in the hands of Mary McKennery, a person over fourteen years of age, and living and residing at said domicile, whose name and the other facts connected with this service, I learned by interrogating said Mary McKennery, the aforesaid Jennie

Holbrook v. Jennie Bronson, his wife.

Bronson being absent from home at the time of said service." The petition of appeal was filed on twenty-second June, and the order of appeal granted on second July, 1872, after hearing the parties, about five months after the said notice.

By article 573 C. P. as amended, an appeal from a judgment of divorce must be asked for within thirty days, not including Sundays, after the signing of such judgment, instead of ten days, and shall operate as a suspensive appeal therefrom, and there shall be no devolutive appeal allowed thereafter. Acts 1871, p. 151.

The right to the appeal in this case depends on the sufficiency of the above notice of judgment, to which the defendant was entitled. C. P. 575, 620.

Having been personally cited and authorized to defend the suit, she was regularly in court, and having, as is shown, a domicile in the parish, any notice to which she was entitled could be made on her personally or at her said domicile (see 12 La. 600, C. P. 187, 192), unless there is some special provision of law which requires another mode of giving the notice.

It is contended in her behalf that inasmuch as it appears that, when the judgment was rendered and notice thereof served at her domicile she was absent or had gone out of the parish, it was necessary to appoint an attorney, upon whom notice of the judgment should have been made, and article 141 R. C. C. is invoked as authority. This article is in the chapter which treats "of the proceedings of separation from bed and board, and reads: "When the defendant is absent or incapable of acting from any cause, an attorney shall be appointed to represent him, against whom, contradictorily, the suit shall be prosecuted."

This, we construe, as applying to the defendant, who is absent or incapable of acting, at the institution of the suit, and can not be cited in the usual way; but not to one who is legally and regularly a party to a suit, and who voluntarily declines making a defense or temporarily leaves the place of the jurisdiction after being cited. The jurisdiction of the court can not thus be defeated.

If the defendant had been the husband, with a permanent residence in the parish, but absent temporarily on business or pleasure in an adjoining parish or State, we apprehend that notice at his domicile, in the usual manner, would be considered sufficient. We must give the same effect to the proceeding where the wife is the defendant under like circumstances.

The appointment of persons to represent parties to a suit should be made with caution, and in cases clearly designated. Parties to law-suits are presumed to conduct or defend them according to their own opinion of their interests. And while we readily concede that all the

 Holbrook v. Jennie Bronson, his wife.

legal formalities should be strictly observed in divorce suits, we are not authorized in requiring parties to do more for themselves than they choose to do, or in doing more for them than they desire to have done. We can not consider the defendant in this case as an absentee within article 141 R. C. C.

It is therefore ordered that the appeal herein be dismissed with costs. Rehearing refused.

25	53
46	1205

 No. 3646.

SUCCESSION OF JAMES M. PINNIGER. Rule against WIDOW FLANNER, purchaser.

The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix were not absolute nullities, and can not be attacked collaterally. Where a divorced wife marries again, and after the death of her first husband, claims to exercise her rights of tutorship by nature over the issue of her first marriage;

Held—That the forfeiture announced in article 254 of the Revised Code has no application to her case.

There is no law prohibiting a divorced wife from becoming natural tutrix of her children after the death of their father.

The fact that there are no special tutors *ad hoc* appointed for minors at the time of the sale of their property does not concern the purchaser.

The services of special tutors *ad hoc* are not necessary to effect a sale of minors' property. Their duty begins at the partition before the notary, if not appointed at the time of the sale, they may be appointed afterwards and before the notary begins the partition.

The purchaser at a judicial sale is protected by the decree ordering the sale, and is not bound to look beyond it.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. O. M. Conrad & Son, William Grant, E. T. & E. J. Fellows*, for G. F. Porter, executor and tutor, and al. appellants. *W. Murphy*, for Widow Flanner, appellee.

Justices concurring: Ludeling, Taliaferro, Howell and Wylly.

WYLY, J. In 1869 James M. Pinniger obtained judgment of divorce against his wife, Emily Robertson, and it was ordered that the children, the issue of the marriage, be placed under the care of the father, except Martha, the youngest, who on account of her youth was placed under the care of her mother. After the divorce, but during the life of said James M. Pinniger, the said Emily Robertson married W. W. Freeman. Subsequently, to wit: In October, 1870, James M. Pinniger died, leaving a small succession and leaving a will bequeathing his property to his four children, to wit: James R., Emily Y., Isaac M., and Martha Pinniger, and appointing George F. Porter testamentary executor and also tutor to the minor, Emily Y. Pinniger.

On the twentieth December, 1870, the said Porter was duly qualified and received letters in both capacities. Mrs. Freeman was confirmed, on the advice of a family meeting, as natural tutrix of the other three minors.

On the advice of a family meeting the court subsequently ordered the sale of the property in order to effect a partition. After due advertisement, and observance of the formalities of law, the auctioneer sold the property pursuant to the order of the court. A part thereof was adjudicated to Widow Flanner, who refused to comply with the terms of adjudication and a rule was taken to compel her to do so.

To this rule the purchaser filed an answer setting forth that she refused to comply with the adjudication, for the reason that there is a cloud on the title offered her, that the formalities required by law for the settlement of a succession, or to make a partition between minors, had not been complied with, in the following particulars, to wit:

First—That one of the heirs (all being issue of the same marriage) is represented by a testamentary tutor appointed by the father during the existence of the mother of the minor, which is null.

Second—That the other minors are represented by their mother who was appointed natural tutrix after having contracted a second marriage which could not legally be done.

Third—That the mother after contracting a second marriage could only be appointed dative tutrix, and that as such, like all dative tutors, was bound to give security, and that until all the formalities required by law have been complied with, the acts of the so called tutor has no binding effect on the minors.

Fourth—That the mother having been divorced by a judgment of the Fifth District Court, and deprived of the care and control of the same minors, she could under no circumstances be appointed their tutrix.

Fifth—That to effect the partition, the heirs having separate and opposing interests in the succession, should have been represented by special tutors *ad hoc* for each of them, which was not done.

Sixth—That a partition thus made is only provisional and can be set aside at any moment on the application of any of the minors.

The court dismissed the rule and the testamentary executor and the tutors of the minors appeal. We think the court erred.

The judgment appointing George F. Porter testamentary tutor of the minor, Emily Y. Pinniger, and the judgment appointing the mother of the minors natural tutrix of the other three children, are not absolute nullities, and they can not be attacked collaterally. 14 An. 623; 13 An. 380.

The forfeiture announced in article 254 Revised Code has no application to a case like this. Mrs. Freeman was not married while she was natural tutrix. At the time of her marriage to Freeman there was no tutorship, because the father of the children, James M. Pinniger, was living. It was not till after his death that a tutorship became necessary.

We know of no law prohibiting a divorced wife from becoming

Succession of Pinniger.

natural tutrix of her children after the death of their father. The fact that there were not special tutors *ad hoc* appointed for the minors at the time of the sale does not concern the purchaser. Their services were not necessary to effect the sale. Their duty begins at the partition before the notary. If not appointed at the time of the sale, they might be appointed afterwards, and before the notary begins the partition. The only interest the purchaser has is to get a good title.

Here is a regular proceeding for the sale of the property to make a partition. The order of sale is based upon the advice of a family meeting, and the advertisement and all the formalities necessary for the sale seem to have been complied with.

It is well settled that the purchaser at judicial sale is protected by the decree ordering the sale, and is not bound to look beyond it. 11 La. 156; 13 La. 431, 432; 16 La. 440; 3 R. 122; 2 An. 466, 507; 14 An. 622; 15 An. 250, 676, 641; 18 An. 485, 407; 21 An. 425, 505, 514; 22 An. 175, 629; 23 An. 628, 630, 614.

On complying with the terms of adjudication the purchaser will get a valid title to the property, and that is all the interest she has in the controversy.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the rule herein be made absolute at the costs of the appellee in both courts.

No. 2839.

JOSEPH MACHECA v. PHILIP AVEGNO, AND PHILIP AVEGNO v. JOSEPH MACHECA. (Consolidated cases.)

Servitudes, when an act of sale is silent on the subject, can only be shown by proof of the use or existence thereof for a period sufficient to establish title, and this may be proved by parol. All agreements in relation to such use may also be proved by parol, unless it is shown that they were reduced to writing.

The evidence in this case shows that the alleged servitudes were subject to the will of the owner of the property on which they were exercised, and that the owner or owners of the other property in whose behalf said servitudes were claimed to be established never acquired any legal title thereto.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. W. B. Koontz*, for appellee. *Sambola & Ducros*, for appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Kennard.

HOWELL, J. These two suits involve the right to the servitudes of passage and of drain claimed by one of the parties upon the property of the other, and damages alleged to have resulted from an injunction taken out by the creditor of the servitudes, which was dissolved in a former litigation.

Macheca v. Avegno, and Avegno v. Macheca.

The claimant or creditor of the servitudes objected to oral proof of any agreement between the former owners of the two properties as to the title to said servitudes, on the ground that they are real property, and the proof must therefore be in writing.

As the various acts of sale of the two properties are silent in regard to the alleged servitudes, the said servitudes can only be shown by proof of the use or existence thereof for a period sufficient to establish title, and this use may be proven by parol. It follows that all agreements in relation to such use may also be proven by parol, unless it is shown that they were reduced to writing, which was not done.

The evidence in this case shows that the alleged servitudes were subject to the will of the owner of the property, on which they were exercised, and that the owner or owners of the other property never acquired any legal title thereto. The judgment, therefore, on this question was correctly rendered in favor of the alleged debtor.

As to the damages, they were claimed in reconvention in the injunction suit and rejected as of nonsuit. The evidence in the present proceeding does not establish the right to the damages claimed or allowed. See 12 An. 587.

It is therefore ordered that the judgment in the case of *Macheca v. Avegno* be affirmed, with costs in the lower court, and that the judgment in the case of *Avegno v. Macheca* for \$180, general damages, and \$250 special damages, as counsel's fees, be reversed, and that there be judgment on the claim for damages against the said Avegno, plaintiff, with costs of said suit in the lower court—appellee to pay costs of appeal.

No. 2549.

SUCCESSIONS OF ANDREW DUNFORD AND MARIE CHARLOTTE REMI, his wife. Application of PIERRE MASPERO for Letters of Dative Testamentary Executor and Administrator—EDGAR MARINE et al. in opposition.

Where the heirs have been put in possession of the succession of their father and mother by the Probate Court, the succession is terminated. The property passes to the heirs and the debts of the deceased become the debts of the heirs, each being liable for his virile share. The application for administration is too late, and if the appellant be a creditor, his remedy is against the heirs.

A PPEAL from the Parish and Probate Court, parish of Plaquemines. *Prescott, J. Pierre Maspero*, for appellee. *Sambola & Ducros*, for appellants.

Justices concurring—Taliaferro, Wyly and Howell.

WYLY, J. The controversy in this case is about the appointment of a dative executor and an administrator. The heirs oppose the appointment on several grounds, the most effectual being there is no succes-

25	56
45	94
25	56
48	178

Successions of Dunford and Marie Charlotte Remi, his wife.

sion to administer, because they have long since gone into possession under a regular order of court.

The application for administration was filed in October, 1869. In 1867 the Probate Court put the heirs in possession of the succession of their father and mother. This terminated the succession; the property passed to the heirs, and the debts of the deceased became the debts of the heirs, each being liable for his virile share.

If the applicant for administration be a creditor, his remedy is against the heirs.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the application of Pierre Maspero be rejected with costs of both courts.

No. 4423.

JOHN T. MICHEL *v.* JOHN KAISER and al.

The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale. Art. 689, Code of Practice.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. R. King Cutler, and E. K. Washington*, for plaintiff and appellant. *Cotton & Levy and E. Filleul* for defendants and appellees.

Justices concurring—Ludeling, Taliaferro, Howell and Kennard.

TALIAFERRO, J. The plaintiff brings this action against the defendant and other parties to recover from them "The Magazine street Railroad," which the plaintiff alleges he bought at a sheriff's sale, having been the last and highest bidder for the property, and thereby acquired the right to have it adjudicated to him as the purchaser. That the sheriff, in violation of the rights of petitioner and of his own duties as an officer, wrongfully and illegally adjudicated the property to the defendants at a less sum than that bid by him. The sheriff is also made a party defendant. The defendants severed in their answers, pleading the general issue. There was judgment for the defendants and the plaintiff has appealed.

It seems that some time in the year 1872, the Magazine street Railroad was sold at sheriff's sale, and that the plaintiff and two or three of the defendants were the principal competitors in bidding for the property. Upon the first offering the property was knocked off to Michel, the plaintiff, at the price of \$149,000. A surety was offered by Michel worth \$60,000. The deputy sheriff who made the sale demanded another surety or sureties. A short delay was asked for and granted to enable Michel to procure additional security. Failing

Michel v. Kaiser and al.

in this the property was reoffered and Michel bid again in competition with the same parties who bid at the first exposure. When Michel's bid reached \$60,000 the sheriff inquired of him if he had any other surety present besides Kerr, the person first offered, who had stated under oath that he was worth \$60,000. Michel replying in the negative, the sheriff then said "I will not take Michel's bid beyond what he says he is worth." Notwithstanding this he received Michel's bid to the amount of \$67,000. Kaiser bid \$68,000 and Michel bid \$69,000. But the testimony of Philips, one of the witnesses, who is an attorney, attended the sale in the interest of a client, and who, it appears, was attentive to all that passed, is that when Michel bid \$67,000 the sheriff warned him that he could not receive his bid with the proposed surety for any larger amount. This statement is corroborated by the testimony of the sheriff himself who says: "The last bid of the party to whom it was adjudicated was \$68,000; Michel bid \$69,000; I refused peremptorily to take the bid; then I cried the property with a loud and audible voice at \$68,000. I refused to take Michel's bid; he was bidding \$69,000. I made up my mind that taking Kerr for \$66,000 or \$67,000 and the check for \$2000 that he gave me, was more than Kerr was worth. I gave time to the party. Michel came forward and asked if I would delay; I told him I could not delay much; it was the second adjudication. Then the property was sold to the parties who complied with the terms of the sale instantly."

It appears that the terms of the sale required the payment of \$2000 in hand to cover costs, taxes, etc., and that Michel had tendered his check for that amount, which the sheriff was willing to receive. It was contended in argument that as the sheriff was willing to receive Kerr as surety for \$67,000 and the check for the \$2000 cash, Michel had complied with the terms by offering accepted security for his bid of \$69,000. Whatever may be said of this we think the testimony shows that the sheriff had at no time considered the obligation of Kerr together with the check to be sufficient for more than \$67,000. He distinctly notified Michel, while crying the property the second time, that the security tendered by him would not be received for more than \$67,000. We are unable to see that the sheriff's acts in making the sale are unauthorized by law. He seems to have been governed by the provisions of article 609 of the Code of Practice. He had the right to judge of the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale. We see no error in the decree of the lower court.

Judgment affirmed.

Rehearing refused.

Benoist et al. v. Markey, Tutor, et al.

No. 2627.

L. A. BENOIST et al. v. THOMAS MARKEY, Tutor, et al.

The prescription of three years set up against a suit for settlement of the affairs of a partnership is not applicable when no settlement of its business and no adjustment of the liabilities of the copartners among themselves have taken place.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. H. C. Miller and Thos. Hunton*, for plaintiffs and appellees. *Spofford, Wooldridge & Thomas*, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro and Howell.

TALIAFERRO, J. This is a suit for the settlement of a partnership. The partners were Benoist, Shaw, Murphy and Newman, and the partnership was entered into in 1859 for the purpose of doing business in exchange in New Orleans. It seems that Benoist and Shaw furnished the capital and the other two contributed their industry and skill in the business they engaged in; the shares respectively in profits and losses were fixed by a written act passed before a notary public.

The war coming on soon after the parties went into business, they were unsuccessful in their operations, and sustained heavy losses. Shaw died in 1863. Benoist, Newman and Murphy became the liquidators of the firm, and so continued until July, 1865, when Murphy died and Benoist and Newman became the liquidators. So matters stood until April, 1866, no final settlement having been made, the present suit was instituted by Benoist and the administrator of Shaw's estate. A receiver was appointed upon the application of the parties. A litigation of several years duration ensued. During this period Benoist and Newman died, and the contest was continued by the executor of Benoist and the administrator of Newman's estate. Experts were appointed by the court to investigate the books and affairs of the partnership, and having complied with the order of the court they made their report and exhibit. The receiver also made a report to the court. Judgment was rendered decreeing that the executor of Benoist recover from the tutor of the minor heirs of Murphy and from the estate of Newman *in solido* the sum of \$7015 15 as the proportional amount of the loss of Benoist upon his capital which has to be sustained by Murphy and Newman's estates.

In like manner the judgment awarded against the estates of Murphy and Newman *in solido* in favor of Shaw's administrator the sum of \$4687 70, as the proportional amount to be borne by these estates on account of the loss sustained by Shaw upon the capital invested by him. From this judgment appeals were separately taken by the tutor of the minor heirs of Murphy and the administrator of Newman's estate.

Benoist et al. v. Markey, Tutor, et al.

In this court, by consent of parties, the appeal taken in behalf of Murphy's heirs was dismissed.

The appellees ask that the judgment be amended so as to make each of the appellants bound for the amounts expressed and not a judgment *in solido* which might be discharged by payment by one.

The prescription of three years set up against the suit for settlement of the partnership affairs is not applicable, no final settlement of its business and no adjustment of the liabilities of the copartners among themselves having taken place. There are several bills of exception in the record taken to the admission of certain documents and letters in evidence which it is unnecessary to consider in deciding this case.

No exception was taken to the report of the experts appointed by the court to examine the books and papers of the partnership, which seems to fairly show the state of the business of the firm, its assets, liabilities, etc., and it appears to form the basis on which the judge below rendered his decision. There is no brief on the part of the appellants and no assignment of errors. There appears to us no error in the judgment except that pointed out by the appellees, and which must be corrected.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed.

It is further ordered that the executor of Benoist recover from the estate of Newman seven thousand and fifteen dollars and fifteen cents; and in like manner that the administrator of Shaw's estate recover from the estate of Newman the sum of four thousand six hundred and eighty-seven dollars and seventy cents, and all costs of suit.

Rehearing refused.

No. 2835.

STATE OF LOUISIANA ex rel. GEORGE W. SADDLER v. J. O. LANDRY
and W. S. MOUNT, CITY OF NEW ORLEANS.

The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, page 414, Ray's Revised Statutes. It is confined to civil matters, and there is no other law conferring upon them criminal jurisdiction.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Brice & Mitchell* for plaintiff and appellee. *J. R. Beckwith*, City Attorney, for appellant and defendant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Kennard.

KENNARD, J. Relator seeks to recover from the city of New Orleans fourteen hundred and thirty-five dollars and forty-two cents for fees and costs accruing in sundry criminal suits instituted before him while he was the First Justice of the Peace for the parish of Orleans.

State ex rel. Saddler v. Landry and Mount, City of New Orleans.

The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, p. 414, Ray's Revised Statutes, in these words: "Justices of the peace for the parish of Orleans, except as hereafter provided, shall have power to hear and determine all civil causes when the amount in dispute does not exceed one hundred dollars, exclusive of interest and costs. Their jurisdiction shall be concurrent and shall extend over the parish of Orleans, with the exception of that portion which lies on the right bank of the Mississippi river.

"They shall also be empowered, and it shall be their duty to issue marriage licenses when legally required in accordance with existing laws; to keep a record of the same and to celebrate marriages, of which they shall also keep a record, and it shall be the duty of the justices to deliver the said record to their successors in office."

We find no mention of criminal matters in this section and no other law conferring criminal jurisdiction upon justices of the peace in the parish of Orleans.

Relator was therefore without authority to render the services for which he claims compensation and can not recover.

Let the judgment appealed from be avoided and reversed at relator's costs, and let judgment be entered for respondent, dismissing relator's claim.

No. 4370.

THE STATE ex rel. ADELAIDE DEBLIEUX v. RECORDER OF MORTGAGES
et al.

A party for whom a building is erected is not responsible for materials furnished to the contractor, if said party has not been notified of any claim against the contractor before payment according to the contract, and a detailed bill recorded according to law.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. C. E. Schmidt*, for relators and appellees. *Robert Preston and F. W. Baker*, for respondents and appellants.

Justices concurring: Ludeling, Taliaferro, Howell and Kennard.

HOWELL, J. The relator, Mrs. Deblieux, asks for a mandamus upon the Recorder of Mortgages to erase a privilege inscribed in the proper book in his office as resting upon her property in this city. The Recorder of Mortgages caused the creditors of the privilege, F. Fischer & Son, to be notified of the proceeding, and they appeared, excepted to the form of proceeding, and asserted a just and equitable claim against Mrs. Deblieux and one C. Travers, with a privilege on the buildings and property of Mrs. Deblieux, which claim is recorded in book 92, folio 264, and is for lumber furnished and used in the erection of said buildings.

State ex rel. Adelaide Deblieux v. Recorder of Mortgages et al.

The court below made the mandamus peremptory, and Fisher & Son appealed.

The facts are that Mrs. Deblieux entered into a contract with the said C. Travers to erect certain buildings on her property according to certain specifications, and payments to be made at particular stages in the progress of the work. This contract was recorded. When the first installment was due Mrs. Deblieux paid it in accordance with the terms of the contract, and Travers, the contractor, abandoned the work and left the city, and on the same or the next day a member of the firm of Fischer & Son called on Mrs. Deblieux and informed her that the lumber used by Travers was furnished by them, and was unpaid for. They desired her to pay the bill, which was made out in Travers' name, and upon her refusal they caused it to be recorded with her name inserted.

This formality was unavailing in operating an incumbrance on the property of the relator. She did not owe the contractor anything, and had not been notified of any claim against the contractor before she paid him in accordance with her contract. Fischer & Son did not furnish her with the lumber and record a detailed bill thereof against her according to law. R. C. C. 3249, section 3, and 2773.

Judgment affirmed.

Rehearing refused.

No. 4391.

THE MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY v. J. O. NOYES, A. MERLE and als.

Where the claim by plaintiffs was to be reimbursed their own money, that was appropriated to the payment of a judgment for which the owners of a certain piece of property were liable, and which was rendered contradictorily with them;

Held—That the payment of that judgment carried with it a legal subrogation of the plaintiffs to that judgment.

APPEAL from the Second Judicial District Court, parish of St. Bernard. *Jorda*, parish judge in place of *Pardee*, J., recused. *Henry B. Kelly*, for plaintiffs and appellees. *Alfred Grima*, for A. Merle and al., appellants.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly.

TALIAFERRO, J. The litigation in this case arises on the question as to how a certain sum of money paid by the plaintiffs for expropriated lands shall be distributed. The facts as we find them may be stated as follows: The company obtained a judgment of expropriation of certain land in the parish of St. Bernard, and paid into court the amount awarded by the jury, \$12,000, and took a rule for the distribu-

tion of the fund contradictorily with all parties in interest claiming to be paid by privilege and preference to all other creditors the sum of \$6710, with interest and costs. This claim set up by the company is predicated upon the following state of facts: Prior to the expropriation for which this sum of \$12,000 was paid, the company had, in a previous suit, obtained a judgment for the expropriation of a large quantity of land, of which the land expropriated in the second suit forms part, and had deposited in court the sum of \$50,000, awarded by the jury in that case. The lands expropriated in these cases constitute portions of a large estate in the parish of St. Bernard, known as the Phillipen estate. This plantation had been for several years in possession of the sheriff of that parish under a writ of seizure and sale issued at the instance of the Merle heirs, defendants in the present rule, which was suspended by injunctions obtained by the then owners of the property. In consequence of these proceedings a large amount of costs had accrued, which were claimed by the sheriff and the curator *ad hoc* appointed to represent absent litigants in the various suits growing out of the seizure of the property by the Merle heirs under their first mortgage. The sheriff and curator *ad hoc* on a rule taken by them against the Merle heirs and others in interest, for a distribution of this sum of \$50,000, recovered a judgment by which their claims for costs were recognized and ordered to be paid out of the fund deposited by privilege and preference over all other creditors or parties therein interested. No appeal was ever taken by any of the parties to the rule, and in due course of proceedings the amount of the judgment so obtained (\$6710) was paid to the sheriff and the curator out of that fund.

In the meantime the Merle heirs had brought a suit in the Circuit Court of the United States to annul the first judgment of expropriation for which the \$50,000 had been deposited, on the ground that it was obtained fraudulently and worked injury to them. Some time after the satisfaction of the judgment in favor of the sheriff and curator, the plaintiffs with the consent of the defendants in the expropriation proceeding, the owners of the land, obtained a decree of the district court canceling and annulling the judgment of expropriation, and allowing them to withdraw the remainder of the fund of \$50,000 after the satisfaction of the judgment in favor of the sheriff and curator for costs. Subsequently, the second judgment for expropriation of a smaller quantity of land was obtained, and the award in that case of \$12,000 was deposited. The company now claim that as the judgment in favor of the sheriff and curator of \$6710 was paid out of their money (the \$50,000 deposited by them under the first award), they are entitled to be reimbursed out of their deposit of \$12,000.

In answer to the rule taken by the company the Merle heirs set up

various grounds of opposition, the principal of which are: *First*—That the voluntary rescission of judgment and withdrawal of the deposit of \$50,000 operated a renunciation on the part of the company of the rights which may have been claimed thereunder, by which the company are estopped from invoking the said judgment of expropriation. *Second*—That the payment of the claim of \$6710 to Chalaire and Tully extinguished the same, and the company received no subrogation by law to the said creditor's rights.

The judgment of the lower court made the rule absolute and ordered that the plaintiffs, the Mississippi and Mexican Gulf Ship Canal Company, be paid out of the fund of \$12,000 the sum of \$6710, with five per cent. interest from the thirtieth of November, 1869, and costs, with privilege preference and priority over all other claims against said fund, and the balance of the fund which is not claimed by any one else on this rule shall remain so deposited until the further order of the court.

From this judgment the Merle heirs have taken this appeal.

The heirs of Merle claim nothing from the effect of the judgment of expropriation which was annulled, but rather claim to be put in the same situation they were prior to the rendition of that judgment, having sued in the United States Circuit Court to have it annulled. They do not in their pleadings set up any claim themselves to the fund in question, but seem to rest upon their alleged right as mortgage creditors upon the Phillipen plantation, insisting, as we understand them, that their rights can not be affected by the payment of the company's claim of \$6710; and praying only that their motion be dismissed with costs. The claim here set up by the plaintiffs in rule is to be reimbursed their own money which was appropriated to the payment of a judgment for which the heirs were liable, and which was rendered contradictorily with them. That fund was the price of a large portion of the Phillipen plantation. The payment then of the judgment for \$6710 out of that fund carried with it a legal subrogation of the plaintiffs to that judgment. Civil Code, article 2161. Subrogation takes place of right—

“For the benefit of the purchaser of any immovable property who employs the price of his purchase in paying the creditors to whom this property was mortgaged.” The payment in this case was by judicial decree made to creditors having a privilege, which took precedence of the mortgages upon the property. Civil Code, article 3252.

We are satisfied that the decree of the court *a qua* was properly rendered.

Judgment affirmed.

Rehearing refused.

State of Louisiana v. The North Louisiana and Texas Railroad Company.

No. 4414.

25	65
117	290

THE STATE OF LOUISIANA v. THE NORTH LOUISIANA AND TEXAS RAILROAD COMPANY.

Where it is clearly the purpose of the Legislature to give a company time within which they would have an opportunity to accept certain conditions imposed by that body, it can not be contended that official negligence in promulgating the law, should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept; it would enable such official negligence to defeat the legislator's will.

Where the liability for interest coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release for the bonds includes the liability for the coupons.

On the question in this case whether the act No. 97 of 1872, relied on by the defendants, is null and void on the ground of its being in conflict with the prohibition in article 111 of the constitution, because it has repealed, without containing any adequate provision for the same purpose, that provision of act No. 108 of 1868, obligating the defendants to deposit in the State Treasury, at prescribed dates, the money to pay certain bonds and interest coupons issued—which obligation was secured by a second mortgage on the railroad, its fixtures, and appurtenances—

Held, First—That the State by making the act No. 108 of 1868, the basis of its suit, recognized and affirmed its constitutionality in regard to the adequate ways and means provided for the payment of the current interest and the principal of the bonds.

Second—That there is nothing in the record to enable the court to determine whether or not the provision made in the law of 1872 is an adequate provision for the payment of the principal and interest of the debt created by the law of 1868, and that there may be a reasonable doubt as to whether the act of the later date actually repeals that of the earlier, in the contemplation of article 111 of the constitution.

Third—That the law creating the debt is certainly not repealed, and that the debt of the State so created being still in existence, the State is precluded, in this proceeding at least, from contesting its validity, or that of the means first provided for its payment; and that it is only the form and nature of the security required of the railroad company that has been changed.

Fourth—That it was proper to conclude that there is such reasonable doubt with regard to the unconstitutionality relied on, as, under the well settled jurisprudence of this State and country, to justify the court in not annulling the legislative enactments referred to in this case. When there is a doubt, a law will not be held unconstitutional.

Fifth—That this is a controversy between the State, which issued the bonds, and the railroad company for whose benefit they were issued; that the holders of the bonds and their rights are not before the court, nor any claim to enforce the payment of said bonds; that the State having paid some of the interest on them which it alleges the company were obliged to pay, and now seeking to collect back the same, the plea that the company settled with the State in accordance with act No. 97 of 1872, is a valid defense. There is nothing in the constitution inhibiting the State from accepting from its debtors such settlements as the Legislature may think judicious.

Where the demand was for the return and annulment of three hundred bonds alleged to have been issued after default, on its being proved that no such bonds were issued, a final judgment will be given, as insisted on by defendants, instead of one of nonsuit.

A PPEAL from the Fourteenth District Court, parish of Ouachita, *Caldwell*, Parish Judge, presiding in place of the District Judge, recused. *Simeon Belden*, Attorney General, and *Edward Philips* for plaintiff and appellee. *John Ray*, for defendants and appellants.

Chief Justice Ludeling, being interested, was recused.

Justices concurring: Howell, Taliaferro, Wyly and Kennard.

HOWELL, J. The State of Louisiana, through Attorney General Belden, instituted this suit in September, 1872, to recover from the North Louisiana and Texas Railroad Company the sum of one hundred and twelve thousand eight hundred dollars, with legal interest thereon

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from specified dates, subject to certain credits, it being the amount of the interest coupons, which were taken up and paid by the State on five hundred and forty-six bonds of one thousand dollars each, issued to said company in 1869 and 1870, pursuant to act 108 of 1868, by which the company were required to deposit with the State Treasurer the money to pay the interest; also the sum of five hundred and forty-six thousand dollars, the principal of said bonds with legal interest from judicial demand, and to enforce the second mortgage created by said act upon the said railroad and all its fixtures, rolling stock and appurtenances to secure the payment of said bonds and interest; and lastly, to recover the possession of three hundred bonds alleged to have been illegally issued to the said company after they were in default in failing to deposit the money necessary to meet the interest as it fell due, as is required by the said act No. 108.

The answer contains a general denial, and a special denial that any bonds were issued when the company were in default, and sets up the act No. 97 of 1872, published on twenty-first September, 1872, and the acceptance of the terms thereof by the company as a release from all liability to the State, and a perpetual bar to any suit by the State in regard to the bonds issued under act 108 of 1868.

From a judgment in favor of the State for \$87,360, amount of interest coupons paid, with eight per cent. interest thereon from certain dates, and an order for the enforcement of the second mortgage upon the railroad, etc., and a nonsuit on the claim for the return of the three hundred bonds, the company have appealed.

The act No. 108 of 1868, which is the charter of the North Louisiana and Texas Railroad Company, authorized the issuance to said company of six thousand dollars of State bonds for every mile of track when completed, to be transferable by the indorsement of the president of the company, and with the interest at eight per cent., payable semi-annually, to be secured by a second mortgage in favor of the State, upon the said railroad, fixtures and appurtenances, the company having the right to execute a first mortgage to the amount of fifteen thousand dollars per mile, which by act No. 105 of 1871 was increased to twenty-five thousand dollars per mile, and it was made incumbent on the company "on or before the maturity of any of the interest coupons on any of said bonds to deposit the amount thereof in the State treasury for the payment thereof, and in the event of the failure of said railroad company to make such deposit for the payment of the interest coupons, or any bonds so issued to them, that no further issue of bonds shall be made to said railroad company, and the State shall have the right to foreclose the mortgage herein given to secure the payment of the bonds and interest issued to said board, according to the provisions of this act." See sections 11 and 12.

The claim to enforce the payment of the bonds having been abandoned by the State, the sole question involved on this appeal is the right to collect from the company the interest for which judgment was rendered below. The defense rests solely upon the act No. 97 of 1872, entitled "An Act to authorize the North Louisiana and Texas Railroad Company to substitute stock of said company, instead of second mortgage in favor of the State, and to release the said company from other liabilities to the State." It provides that in lieu of the second mortgage required by section eleven of act No. 108 of 1868, to be given to secure the State for the ultimate payment of the bonds issued in accordance therewith, the company may give its stock to the State to an amount equal to the aggregate sum of the State bonds issued or to be issued under the charter, to wit, 11,220 shares, and on the issue and delivery of said stock by the company to the State, the former shall be relieved from all liability on the aforesaid bonds of the State, and on the said delivery being made, the remainder of the whole number of bonds authorized by the charter shall be immediately issued; and that within sixty days after the passage of the act the president and directors of the company shall, at a meeting for the purpose, adopt the provisions thereof, and within ninety days thereafter a copy of the resolution of adoption shall be delivered to the Governor, who shall file it in the office of the Secretary of State, and as soon as the certificate of said stock is tendered, the Governor shall cause the remainder of the said bonds to be delivered, which, with the bonds already issued, shall be payment in full for said stock; and the Governor shall appoint, annually, on behalf of the State, one of the nine directors to represent the State.

It is urged on behalf of the State that the conditions or terms of this act were not accepted within the prescribed time; that it does not release the company from the liability to refund what the State had paid on account of the company before the act was passed, and that it is unconstitutional because, by necessary implication, it repeals acts 108 of 1868 and 105 of 1871 so far as they stipulate a mortgage in favor of the State or hold the company liable on the bonds issued to them, without having made adequate provision in the said repealing act for the payment of the principal and interest of the bonds, as required by article 111 of the constitution.

First, as to the acceptance of the terms and conditions of the act. It appears to have been approved on the tenth of April, 1872, and it was to take effect from and after its passage; but it was not published until the twenty-first of September following. This is one of the many instances (if plaintiffs theory be correct) suggestive of the evils resulting from the practice, which has grown up within the last four years, of making laws during twelve months of the year instead of sixty days as fixed by one of the articles of the constitution; but, in our

opinion, the acceptance was timely made, whether we consider the law in force from April 10 or September 21 ; for within the sixty days of each date the president and directors adopted resolutions of acceptance, and those of the latter date were transmitted to the Governor. There is and can be no question in this case as to the issuance of the remainder of the bonds within the ninety days after the said acceptance. It was clearly the purpose of the Legislature to give the company time within which they would have an opportunity to accept, and it can not be seriously contended that the negligence of the officers in promulgating the law should make it impossible for such time to transpire and thus deprive the company of the right and opportunity to accept. It would enable them to defeat the legislative will.

Considering the acceptance as having been made within the prescribed time, as we do, there can be little doubt as to the effect of the act, if not unconstitutional, in releasing the company from all liability to the State on the bonds, which necessarily includes liability for the interest on the bonds whether then due or not. One of the objects of the act was to release the company from liability to the State, and by express terms they were upon a certain contingency relieved from all liability on the bonds then issued or to be issued. The liability for the interest coupons resulted solely from and was embraced in the liability for the bonds of which they were a part when issued.

The State has, by making the act No. 103 of 1868 the basis of its suit, recognized and affirmed its constitutionality in regard to the adequate ways and means provided for the payment of the current interest and the principal of the bonds. That provision was the obligation of the railroad company to deposit in the State treasury, at the prescribed dates, the money to pay the interest and the bonds, which obligation was secured by a second mortgage on the railroad, its fixtures and appurtenances. The State now says that the act No. 97 of 1872, relied on by the defendants, has repealed that provision of said act 103, but does not contain some adequate provision for the same purpose, and it is therefore void because in conflict with the prohibition in article 111 of the constitution. This article reads: " Whenever the General Assembly shall contract a debt exceeding in amount the sum of one hundred thousand dollars, unless in case of war to repel invasion or suppress insurrection, it shall, in the law creating the debt, provide adequate ways and means for the payment of the current interest and of the principal when it shall become due ; and the said law shall be irrepealable until principal and interest be fully paid ; or, unless the repealing law contain some adequate provision for the payment of the principal and interest of the debt."

Conceding that the act No. 97 of 1872 repeals, in this respect, the provisions of act No. 103 of 1868, and that the question of the ade-

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quacy of the provision to be made for the payment of the debt and interest is a judicial question, there is nothing in the record to enable us to determine whether or not the provision made in the law of 1872 is an adequate provision for the payment of the principal and interest of the debt created by the law of 1868. But we think there may be reasonable doubt as to whether the act of the later actually repeals that of the earlier date in the contemplation of the above article of the constitution. The law creating the debt is certainly not repealed. The debt of the State so created still exists and the State is precluded, in this proceeding at least, from contesting its validity or that of the means first provided for its payment. It is only the form and nature of the security required of the railroad company that have been changed. By our law a second mortgage was required of the company as security for the payment of the debt created in their behalf. By the other this second mortgage was relinquished upon the company's transferring to the State one-sixth of its entire stock. Upon the policy of those enactments and transactions we can give no authoritative opinion. But we can very properly conclude that there is such reasonable doubt as to their unconstitutionality, in the respects referred to, as, under the well settled jurisprudence of this State and country, to be justified in not annulling them. Where there is doubt a law will not be held unconstitutional. 3 M. 12, 553; 3 N. S. 472; 4 N. S. 138; 5 R. 383; 8 R. 416; 5 An. 96, 756; 8 An. 341; 9 An. 562; 11 An. 722.

There is another view in which this case may be considered, without direct reference to the constitutional question raised by the counsel of the State, and which is quite as favorable to the defense. This is a controversy between the State, which issued the bonds, and the railroad company for whose benefit they were issued, and the holders of the bonds and their rights are not before us. Nor is there any claim before us to enforce the payment of any of said bonds. The State has paid some of the interest on them, which it alleges the company were obligated to pay and which it is seeking to collect, as a debt due by the company. As a defense to the suit the company plead a settlement under act 97, which has authorized a giving in payment. No provision of the constitution inhibits the State from accepting from its debtors such settlements as the Legislature may think judicious.

The company insist that there should be a final judgment instead of one of nonsuit on the demand for the return and annulment of the three hundred bonds, alleged to have been issued after default. In this we concur. The testimony of the officers of the company and the statement or certificate of the Auditor in relation to this fact, are positive that no such bonds were issued.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendants, rejecting plaintiff's demands.

TALIAFERRO, J., *concurring*. The only important question in my judgment that arises in this case is, as to the constitutionality of the act of the Legislature passed April 10, 1872, and numbered 97. On the part of the State it is contended that it violates article 111 of the State constitution. That article provides that "whenever the General Assembly shall contract a debt exceeding in amount the sum of one hundred thousand dollars, unless in case of war to repel invasion or suppress insurrection, it shall, in the law creating the debt, provide adequate ways and means for the payment of the current interest and of the principal when the same shall become due, and the said law shall be irrepealable until principal and interest be fully paid; or, unless the repealing law contain some adequate provision for the payment of the principal and interest of the debt."

The last sentence or clause of article 111 gives to the General Assembly a latitudinous discretion in the matter of providing ways and means for the payment of the debts it may contract exceeding in amount \$100,000. The act No. 97, I conceive, virtually repeals the act 108, approved September 26, 1868, as to the kind or form of security required. In the latter act a second mortgage is retained upon the railroad, its fixtures, appurtenances, etc. The act No. 97 substitutes stock of the company in lieu of the second mortgage retained by act 108. This the Legislature had the right to do under the wide discretion it has under article 111 of the constitution. But the question here arises, has the General Assembly provided adequate means by the act No. 97 for the payment of the principal and interest of the debt contracted by the act 108 of September, 1868? This question, it is held on the part of the defendant, is for the General Assembly to determine. I think otherwise. Here the State raises the question of the constitutionality of an act of the Legislature. It is not for the party with whom the issue is made to decide it. It is to be solved by determining whether "adequate means" has been provided by the Legislature for the payment of the debt it has created. In my view of the case it becomes a judicial question. Either the force and value of the second mortgage or the value of the stock of the company will run *pari passu* with the fortunes of the company in the future depending upon the success and business of the railroad. From the lights before me I am unable to say that the stock of the company transferred to the State is not "adequate means" provided for the payment of the debt created. With the policy of substituting the stock in place of the second mortgage the courts have nothing to do.

Entertaining these views of the subject I concur in the decree rendered in the case.

Given, Watts & Co. and Norton and Tarleton, assignees, v. Alexander & Co.

No. 2846.

GIVEN, WATTS & CO. AND E. E. NORTON AND J. J. TARLETON,
 assignees, v. **G. M. ALEXANDER & CO. RICHESON, ABLE & CO.,**
 intervenors.

A commercial firm can not satisfy the remainder of their claims of 1866 for moneys and other supplies furnished to an agricultural firm, out of the proceeds of the crop of 1867, to the prejudice of another commercial firm who made all their advances in that year, and in whose possession part of the crop has been put by consignment and under a regular bill of lading before the issuing of a writ of sequestration.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Breaux & Fenner and Given Campbell*, for plaintiffs and appellants. *Race, Foster & Merrick*, for defendants and appellees, and *George W. Race*, curator *ad hoc*, also for appellees.

Justices concurring: Taliaferro, Howell, Wyly, Kennard.

KENNARD, J. The proceeds of one hundred and eighty-four (184) bales of cotton are in dispute in this case

The plaintiffs, E. E. Norton et al., assignees of Given, Watts & Co., bankrupts, claim a superior privilege to Richeson, Able & Co., intervenors, upon these proceeds, which amount to the sum of ten thousand nine hundred and forty-nine dollars and eighty-eight cents (\$10,949 88). The respective claims of plaintiffs and defendants exceed the amount of the fund in question, so that we have only to determine the superior right to the whole. A careful review of the facts show that plaintiffs, Given, Watts & Co., a commercial firm residing and doing a cotton factorage business in New Orleans, opened dealings with G. M. Alexander & Co., an agricultural firm, composed of G. M. Alexander and Frank Blair, engaged in cultivating the Marshall plantation, near Milliken's bend, in the State of Louisiana, in the year 1866.

The "account B 2," shows that the first outlay by plaintiffs for account of defendants, Alexander & Co., was on April 18, 1866, and the last was July 14, 1867.

There appears in this account under date of November 15, 1866, the following entry:

"To paid account with Watts, Crane & Co., N. Y., thirty thousand eight hundred and thirteen dollars and eighty-eight cents (\$30,813 88)."

By reference to the record, the agreement to make this payment appears to have been made as early as March, 1866, previous to the actual opening of the account in April, 1866.

The following telegram with the explanatory testimony leaves no doubt of this:

"Telegram No. 10.

"The Western Union Telegraph Company, March 19, 1866.

"To Given, Watts & Co., New Orleans, La.

"Liverpool seventh, nineteen firm, Courtney selling freely. Gold

Given, Watts & Co. and Norton and Tarleton, assignees, v. Alexander & Co.

twenty-eight halves. Frank Blair with George Alexander cultivating three thousand acres, will want along thirty thousand dollars. Is it your interest to furnish?
WATTS, CRANE & CO."

Watts, Crane & Co. are shown to have been doing business in New York, and after the date of this telegram, to have transferred their business with G. M. Alexander & Co. to Given, Watts & Co., of New Orleans, and Given, Watts & Co. paid them the amount due at the time of the transfer by G. M. Alexander & Co., to wit, the sum of \$30,813 88. The assumption of this debt was in March, 1866; the actual payment November 15, 1866.

There is no evidence in the record to show satisfactorily of what items this large indebtedness was composed.

H. F. Given, the head of the New Orleans firm, is unable to swear how this debt to Watts, Crane & Co. originated. The plaintiffs claim in their petition the sum of \$39,974 45, as shown per "account A," but it appears from the testimony of J. J. Tarleton (R. p. 93), one of the plaintiffs and assignees, that this account includes some \$12,000 worth of drafts, accepted by Given, Watts & Co. but not paid; so that the real debt due Given, Watts & Co. by G. M. Alexander & Co., is correctly stated in "account B 2," at \$24,646 70 on March 1, 1868.

It thus appears that the amount of the indebtedness to Given, Watts & Co. by G. M. Alexander & Co., at the close of their dealings, was about four thousand dollars less than the amount assumed by them from Watts, Crane & Co., at the date of the opening of their first dealings.

In other words, G. M. Alexander & Co. have paid all other debts except this assumption, and have paid some four thousand dollars on account of it.

Under this state of facts can they prevail over the intervenors, Richeson, Able & Co., who were in possession of the one hundred and eighty-four bales of cotton, through their agents in this city, Garrard & Craig, to whom it had been consigned and regularly delivered.

These bales belonged to the crop of 1867.

Richeson, Able & Co., of St. Louis, had advanced \$18,402 41 of money and supplies to assist in making said crop.

Given, Watts & Co., and their successors, Given, Brown & Co., had also advanced in the year 1867 several thousand dollars, which were refunded by payments made in that year.

The credit side of "account B 2" shows under dates January 14, 1867, receipt of proceeds draft due twenty-sixth May, \$4755 27, and under July 14, proceeds draft due November 24, \$5647 86, making an aggregate of \$10,403 13, received in 1867 by the collection of these two drafts, which belong properly, as shown by the evidence, to the payments of 1866, thus reducing the payments that properly belong to 1867, from \$20,030 80 to the sum of \$9627 67. The amount in value

Given, Watts & Co. and Norton and Tarleton, assignees, v. Alexander & Co.

of supplies furnished by Given, Watts & Co. and Given, Brown & Co., in 1867, was only \$9447 45, being \$180 22 less than the amount received in that year from Alexander & Co., after passing the two drafts to the credit of the account of 1866.

The naked question then is, shall plaintiffs satisfy the remainder of their debt of 1866 out of the proceeds of the crop of 1867, to the prejudice of Richeson, Able & Co., the intervenors, who made all their advances in 1867?

C. C. article 2166, [2162] provides. "When the receipt bears no imputation, the payment must be imputed to the debt which the debtor had at the time most interest in discharging of those that are equally due."

Applying this rule to the various payments, whether in 1866 or 1867 on the account of 1866, the first imputations must be to the payment of all items of the account of 1866 before the item of \$30,813 88, assumed by Given, Watts & Co., transferred to them from Watts, Crane & Co., New York. The proof is not such as to entitle this item to any privilege whatever.

The balance due being part of this item is entitled to no privilege.

This conclusion dispenses with an investigation of the various accounts and bills of exceptions. Also, makes it unnecessary to decide whether Richeson Able & Co., residents of St. Louis, are entitled to a privilege on the crop under our law.

They were in possession under regular bills of lading before the sequestration issued.

Judgment affirmed.

No. 4424.

STATE OF LOUISIANA ex rel. R. C. RICHARDSON v. JAMES GRAHAM,
State Auditor.

The act No. 6 of 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans and raise a revenue for that purpose," authorizes the removal of the division superintendents upon certain contingencies, and the mere fact of plaintiff's removal is presumptive evidence that it was made for a proper cause. It was incumbent on him to show that the removal was without cause or not in conformity with existing laws.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. R. Stewart Dennee*, for relator and appellee. *Hays & New*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell and Wyly.

HOWELL, J. On the twenty-ninth of March, 1870, the relator was appointed Division Superintendent of Education, first division, in pursuance of the third section of act No. 6 of 1870, entitled "An Act

to regulate public education in the State of Louisiana and city of New Orleans and raise a revenue for that purpose." His term of office was three years, and salary \$2500, payable quarterly upon his own warrant. This proceeding was instituted on the twenty-first of September, 1872, to compel the State Auditor to issue to him a warrant on the State Treasurer for \$1770 55, for amount of salary from the first of December, 1871, to the thirty-first of August, 1872, and from a judgment making the mandamus peremptory this appeal is taken.

The above act which created the office authorized the removal of the division superintendents upon certain contingencies, and the mere fact of relator's removal, which is admitted, is presumptive evidence that it was made for a proper cause. See the case of *Desbree v. Voss*, 19 An. 210, and *Vincent v. Populus*, Opinion Book 37, p. 584. It was incumbent on and in the power of relator to show that the removal was without cause or not in conformity to law. This has not been done. In the cases cited by the relator, provision was not made for the removal as was effected, or no proof of a removal was adduced, and they are therefore not applicable to this case.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant rejecting the application, with costs in both courts.

No. 3688.

SAMUEL McCLELLAND v. THE NEW ORLEANS SUGAR SHED COMPANY.

Where the court is without jurisdiction *ratione materiae* to try a case, it must notice this fact of its own accord, and the appeal will be dismissed. Cons. art. 74.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Cotton & Levy*, for plaintiff and appellant. *Semmes & Mott*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell and Wyly.

LUDELING, C. J. The material allegations of the petition are, that the plaintiff bought fourteen hogsheads of sugar, deposited under the sheds of the defendant, and which were worth \$1700, and that he notified the defendant that he would not pay certain charges which the company was in the habit of making. That notice was given by the following letter:

"NEW ORLEANS, July 18, 1871.

Jules Blanc, Esq., President of New Orleans Sugar Shed Company:

DEAR SIR—This is to notify you, as President of the New Orleans Sugar Shed Company, that I have purchased from Robert Carey fourteen hogsheads of sugar marked Magnolia, and in shed D, and I herewith tender you the sum of two dollars and ten cents, being the sum

McClelland v. The New Orleans Sugar Shed Company.

due the company for the transfer charges on same, and as amount authorized by charter. And I now wish said sugars, as well as all other lots which I may acquire from time to time in due course of business, to remain under cover until disposed of by me, free of any and all other charges than those prescribed by the second section of the ordinance of the City Council of New Orleans, under which you derive authority.. And I do moreover notify you as president of said company, that you are not to insure said sugar, and I do not wish the company to place any watchman over this or any other sugar I have or may have hereafter under any sheds of said company. And further do I notify you to cause no expense for labor on removing said sugars, or any other sugars that I may have stored in said sheds. And you are hereby specially notified that I will not pay the illegal charges of forty cents per month for storing, watching, keeping, or labor on said sugars or any other sugars or molasses which I may have covered in said sheds, all of which you will please take notice.

Yours Respectfully,

SAMUEL McCLELLAND."

The petitioner goes on to recite, that subsequently he sent for a part of the sugar, which he was not permitted to remove without paying the charge of forty cents per hogshead—that the conduct of the company is ruinous to the business of the plaintiff, who is "a merchant and trader"—that the privilege granted by the city to the company is injurious to the vested rights of petitioner and others engaged in business, and that the damages caused by the oppressive and wrongful acts of the company up to date exceed ten thousand dollars, and if continued will break up the business of the petitioner. He prays for an injunction "commanding the company to deliver to him fourteen hogsheads of sugar, free from the charges of forty cents per hogshead, and restraining the company from demanding or claiming from the plaintiff on any sugars or molasses he may in future acquire, or have or place under said sheds, the forty cents per month per hogshead and ten cents per month per barrel of sugar or molasses."

He further prays to have the resolution of said company, fixing the said tariff, declared null and void, and to have the fourteen hogsheads of sugar delivered to him free of charge for storage, and to have the company "forever restrained from asserting a claim for any storage, labor, watching, or insurance on sugar and molasses, which petitioner may acquire or place under said sheds in future, as it contends for under resolution aforesaid. And in default of said sugar being delivered as prayed for, that your petitioner recover judgment for the value thereof, \$1700, with interest from twenty-fifth July, 1871, (reserving his right to sue for damages in a direct action) and that the injunction be made perpetual, etc."

The answer contains a general denial; it admits the letter annexed to the petition was written to defendant, and it avers that on the reception thereof, the company notified the plaintiff to remove his sugar from their shed and custody, if he was not willing to pay the usual tariff.

The gravamen of the plaintiff's complaint is that the defendant exacts illegal charges on the sugar and molasses deposited under its sheds.

The sum of these exactions on the fourteen hogsheads of sugar belonging to the plaintiff (admitting them to be illegal) did not exceed five dollars and sixty cents. And that is the only amount in dispute in this suit. The defendant admits the sugar belongs to plaintiff, and he requested the plaintiff to take it away if he was not willing to pay the customary charges. We are of the opinion, therefore, that this court is without jurisdiction *ratione materiæ* to try this case, and we must notice this fact of our own accord. Constitution, article 74.

It is therefore ordered that the appeal be dismissed with costs.

No. 3837.

FRANCOIS AUG. CHAVANNE v. JACQUES FRIZOLA.

Where the plaintiff claims property by inheritance as sole heir of his father and appends to his petition an order of the proper court recognizing him as such, and decreeing that he be put in possession of his father's estate, and where he alleges that his father had a just and legal title to the property at the time of his decease and was in possession at that time: Held—That the allegations are sufficiently clear to enable him to maintain his action, and that an exception to plaintiff's petition on the ground of its vagueness and failure to set out the title under which he claims can not be maintained.

It is for him to make out his case by sufficient evidence which the defendant is free to resist when presented.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. S. Belden, E. K. Washington and Seymour E. Snaer*, for plaintiff and appellant. *O. Drouet and E. Bermudez*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell and Kennard.

TALIAFERRO, J. The plaintiff appeals from a judgment rejecting his demand in a petitory action brought by him against the defendant.

An exception was taken by the latter to the petition of the plaintiff on the ground of its vagueness and failure to set out the date and origin of his father's title, under which he claims the property in question. The exception was sustained and the plaintiff has appealed.

The plaintiff claims by inheritance as sole heir of his father, and appends to his petition an order of the proper court recognizing him as such and decreeing that he be put in possession of his father's estate. He alleges that his father had a just and legal title to the

Chavanne v. Frizola.

property at the time of his decease, and was in possession at that time.

We think the allegations sufficiently clear to enable him to maintain his action. It is for him to make out his case by sufficient evidence, which the defendant is free to resist when it is presented.

For these reasons it is ordered that the judgment of the lower court be annulled and reversed. It is further ordered that the case be remanded to the court *a qua* to be proceeded with according to law. The defendant and appellee paying costs of this appeal.

Rehearing refused.

No. 2880.

WATERHOUSE, PEARL & CO. v. CITIZENS' BANK OF LOUISIANA.

Where a bank, acting as agent for collecting certain drafts, took Confederate money on the ground that there was at the time no other currency to be had in New Orleans or in any other part of the Southern Confederacy;

Held—That the bank should have collected the drafts in lawful currency, and that if this was impossible, it should have given notice thereof to the principal, or should show that the collection was in that currency and approved by him.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Cotton & Levy*, for plaintiffs and appellees. *Armand Pitot*, for defendants and appellants.

Justices concurring: Taliaferro, Wyly and Kennard.

TALIAFERRO, J. The plaintiffs as holders of a draft for \$8000 and interest, drawn in their favor by the Ocoe Bank of Cleveland, Tennessee, upon the Citizens' Bank of New Orleans, institute this suit to recover the amount so claimed.

The defendants set up several grounds of defense: That the collection of certain drafts by them on account of the Ocoe Bank in 1862, forming the basis of this demand, was made in Confederate money to the knowledge of the Ocoe Bank, there being at that time no other currency in New Orleans as well as in all other places then under Confederate authority. That the president of the Ocoe Bank was fully cognizant of those facts and made no objections to the collection of the drafts on account of that bank in Confederate money. That this Confederate money, so collected by the Citizens' Bank, was taken from defendants by a military order, and therefore they are not accountable for it. They plead as a peremptory exception that the transactions between them and the Ocoe Bank were null and void, having taken place in violation of a prohibitory law—the parties to these transactions being at the time, one of them within the Federal the other within the Confederate lines.

The defendants contend that Waterhouse, Pearl & Co., who sue upon the draft of the Ocoe Bank, could acquire no greater rights than that

Waterhouse, Pearl & Co. v. Citizens' Bank of Louisiana.

bank possessed; that they took the draft with knowledge of the equities existing in favor of the defendants.

There was judgment in favor of the plaintiffs and defendants have appealed.

We think the defense fails. The defendants were agents of the Ocoe Bank and bound to collect their drafts in lawful currency. If that was impossible they should have given notice of that fact to their principals. We do not find it established by proof that the Ocoe Bank knew that its drafts had been collected in the so-called Confederate currency or that the collection made in that currency was approved by it. Neither is it made out by proof that at the time of the transactions between the Ocoe Bank and the Citizens' Bank the former was within Federal lines and the latter within those of the Confederacy.

It is therefore ordered that the judgment of the district court be affirmed with costs.

Rehearing refused.

No. 2538.

SAMPSON BROTHERS v. KATE TOWNSEND.

In this case the defendant resisted the payment of articles of furniture which she admitted to have bought, on the ground that they had been sold, delivered and put up by plaintiffs' father under whom they claimed, for the express purpose of enabling her to fit up and keep a house of prostitution, which transaction she alleged to be reprobated by law, contrary to good morals and therefore of a nature not to be enforced by the court.

Held—That the defendant could not be permitted to avoid the payment of a debt by pleading her own infamy, for reasons assigned in a similar case lately decided, *Hubbard v. Moore*, 24 An. p. 591.

A PPEAL from the Sixth District Court, Parish of Orleans. *Cooley, J.* *Breaux & Fenner*, for plaintiffs and appellants. *L. Madison Day*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Kennard.

KENNARD, J. This case is similar to that of *Joseph B. Hubbard v. Susan D. Moore*, lately decided by this court. The defendant seeks to avoid payment of a debt by pleading her own infamy. Furniture was bought and several installments paid on the debt. She wishes now to pay the balance by lending her aid to the elevation of the morals of the community, and invokes the maxim *contra bonos mores*.

To permit her to succeed by using a good maxim in so bad a cause would not in our opinion work good to the morals of the community, certainly not to defendants. Much refinement was indulged in in argument on the broad question.

The interests of society are better subserved by adhering to plain well defined rules of bargain and sale. To desert these upon the plea of elevating morals, when the means used open wide the door for

Sampson Brothers v. Kate Townsend.

other evils is at least an experiment which courts should be slow to make. We prefer to leave the correction of the evil to the legislative branch of the government.

For the reasons assigned in *Hubbard v. Moore* and the above, it is ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that Sampson Brothers do have and recover judgment against Kate Townsend for the sum of thirty-one hundred and forty-seven dollars and fifty cents, together with interest, as prayed for in plaintiffs' petition, with privilege upon the property sequestered.

Rehearing refused.

No. 2626.

J. CADILLON *v.* JOSEPH RODRIGUEZ and J. C. COLEMAN.

Where a notary stated in his certificate that the notice of protest was served at the residence of the indorser in the hands of his wife, and it appears by the indorser's testimony that he received the notice, a mistake as to the name of a street in designating the locality for the residence, will not be held fatal.

APPEAL from the Seventh District Court, parish of Orleans. *Colemans, J. Saucier and Michinard*, for plaintiff and appellant. *McGloin & Kleinpeter*, for Coleman, defendant and appellee.

Justices concurring: Ludeling, Howell, Kennard and Taliaferro.

LUDELING, C. J. This suit is against the maker and the indorser of a promissory note. There was judgment against the maker for the amount claimed and a judgment of nonsuit as to the indorser.

The only question for decision is whether or not the indorser was duly notified of the non-payment of the note? The certificate of the notary states that notice of the protest of the note was given to the indorser by a letter, etc., "served in the following manner: Mr. J. C. Coleman, at New Orleans, which letter my deputy, Mr. George Grunault, has this day served at the residence of said Coleman, corner of Felicity and Annunciation streets, in the hands of his wife."

It is contended that because the certificate states that the residence of Coleman is at the corner of Felicity and Annunciation streets, the residence of Coleman is elsewhere, therefore due notice was not given. The certificate states that the notice was served at the residence of the indorser by leaving it with his wife; and it appears from the defendant's testimony that he received the notice. The evidence satisfies us that the notary served the notice of protest at the residence of Coleman, by leaving it with his wife, and that he made a mistake in stating the locality of the residence; a mistake which might easily be made by one not very familiar with the streets in that locality.

It is therefore ordered that the judgment of nonsuit be set aside,

Cadillon v. Rodrigues and Coleman.

and that there be judgment in favor of the plaintiff against J. C. Coleman, for the sum of nine hundred dollars, with five per cent. per annum interest from the twenty-third of September, 1869, five dollars and thirty cents costs of protest and notice, and costs of both courts. Rehearing refused.

25	80
45	1135

Nos. 3977, 3977½

DOMINIQUE DURAC v. WIDOW FERRARI. WIDOW FERRARI v. DOMINIQUE DURAC and Sheriff. (Consolidated Cases.)

Where A is a solidary obligor with B, by paying the note he becomes legally subrogated, for the amount of one-half thereof, to the entire obligation of B to the original holder. This subrogation extends as well to the accessory, as to the principal obligation, and the subrogee acquires all the remedies as well as all the rights of the party to whom he was subrogated. Without the remedy of seizure and sale the subrogation would be incomplete.

A was not a mere transferee who could not proceed *via executiva* without an act of subrogation. He was legally subrogated, and as such was thoroughly invested with all the rights of the original holder or payee, as if the same had passed to him by a regular act of conventional subrogation.

Where an objection was made that there was in the record no authentic evidence of the costs of protests and copy of an act of mortgage;

Held—That these costs were a part of those incident to the proceeding, and that, if authentic evidence of the amount thereof was necessary, the rule *de minimis* was applicable.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Albert Voorhies*, for appellant. *M. E. Livaudais* and *O. E. Schmidt*, for appellee.

Justices concurring: Taliaferro, Howell and Wyly.

WYLY, J. In the first of these cases the defendant appeals from a judgment against her for \$100 80, the amount found to be due by her on the demand of the plaintiff for cash disbursed by him for her benefit.

This case presents only questions of fact. It seems to have been examined with great care by the judge *a quo*, and after examining the evidence fully we are not prepared to say that he erred in his conclusion. This judgment is therefore affirmed.

In the second case, the plaintiff under articles 739 and 740 C. P. joined the executory process sued out by the defendant, alleging that the note on which it was based had been extinguished by compensation. In a supplemental petition she alleges that the order of seizure and sale issued improvidently.

First—Because there was no authentic evidence of the payment or the amount actually paid for the mortgage note to which Durac, the defendant, claims to be subrogated.

Second—Because there was no authentic evidence of the payment of the four dollars for copy of mortgage, and the three dollars and eighty

Durac v. Widow Ferrari. Widow Ferrari v. Durac and Sheriff.

cents for protest, included in the order of seizure. The court dissolved the injunction with forty dollars damages and costs, and the plaintiff appealed.

We see no error in this judgment. The plea of compensation is not sustained by the evidence. The defendant is the holder of the note, and the presumption is, he paid the full value thereof. He was a solidary obligor with the plaintiff, and by paying the note he became legally subrogated, for the amount of one-half thereof, to the entire obligation of the plaintiff to the original holder. This subrogation extends as well to the accessory as to the principal obligation; and the subrogee acquires all the remedies as well as all the rights of the party to whom he is subrogated. Without the remedy of seizure and sale the subrogation would be incomplete. 2 N. S. 161. The authorities cited by plaintiff's counsel are inapplicable. The defendant was not a mere transferree, who could not proceed *via executiva* without an act of subrogation. No conventional subrogation was necessary for him. He was legally subrogated, and as such, was as thoroughly invested with all the rights of the original holder, or payee, as if the same had passed to him, by a regular act of conventional subrogation. As to the objection that there was no authentic evidence of the costs of protest and copy of the act of mortgage we will remark that this was a part of the costs incident to the proceeding, and if authentic evidence of the amount thereof were necessary we would hold the rule *de minimis* applicable. Besides, an appeal is the proper remedy where a decree of seizure and sale has been obtained on insufficient evidence.

There is, therefore, nothing in this case to authorize the injunction under articles 739 and 740, C. P.

Judgment affirmed.

DELGADO & Co. v. A. C. WILBUR & Co. S. B. CLARK v. A. C. WILBUR
& Co. THE LOUISIANA NATIONAL BANK v. T. L. MAXWELL,
Sheriff. (*In concurso.*)

The sixth section of the act of 1868, p. 194, concerning the transfer of bills of lading and the effects of that transfer, is only a legislative sanction given to the commercial law of universal application, by which it is held that a bill of lading, legally transferred, gives title to the property it represents. It does not clash with the statute of 1855 incorporated in the 3237th article of the Civil Code.

The article 3237 does not give any privilege upon produce sold for cash. A sale for cash means that, when the property is delivered, the money is to be paid, and where not paid after delivery, so long as the property remains in the possession and under the control of the vendee, the vendor's lien remains as between the parties, but the lien does not follow it when it passes into the hands of innocent third parties. Vendors can not complain if they sell for cash and still allow purchases to take away the goods without paying for the same. The fault being with them, the loss, if any, must be theirs also.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens; J. Hornor & Benedict*, for appellees. *Lea, Finney & Miller*, for Louisiana National Bank, appellant.

Justices concurring: Taliaferro, Morgan, Wyly.

MORGAN, J. A. C. Wilbur & Co., commercial copartners, shipped per steamer Cortez seventy-nine barrels of molasses, for which they received a bill of lading duly executed and delivered.

Seventy-one barrels of this molasses was purchased by Wilbur & Co. from Delgado & Co.; fifty barrels on the seventh February, 1870, and twenty-one barrels on the eighth February, 1870; and eight barrels were purchased by them of S. B. Clark on the eighth February, 1870.

It is admitted that the different sales of this property were made for cash, and that they were delivered to the purchasers on the day of sale.

It is admitted that the shippers indorsed the bill of lading which they had received from the steamer Cortez, and transferred and delivered it to the Louisiana National Bank for a valuable consideration; that is, the bill of lading was indorsed and delivered to the bank to secure the payment of a bill of exchange for \$1800 drawn by the shippers upon Williams, Black & Co. of New York, payable ten days after sight, which was negotiated to the bank upon the faith of said bill of lading, to which the bill of exchange was attached according to mercantile custom, and the bill of lading duly indorsed, passed to the bank with the bill of exchange, for which bill of exchange the bank gave value at the time it was so negotiated to it; that the bill of exchange was duly presented for acceptance and payment, which was refused; that the bill was protested; that notice thereof was given to the drawer; and that the bank holds the bill of exchange and the bill of lading.

Delgado & Co. v. Wilbur & Co.; Clark v. Wilbur & Co.; Louisiana National Bank v. Maxwell.

It is admitted that the molasses in question was not paid for at the time of purchase, and that it was unpaid for at the time of the institution of these proceedings.

On the tenth February, 1870, Delgado & Co. and S. B. Clark, by separate proceedings, instituted suit against Wilbur & Co., alleging the sale of the property in question and the non-payment of the price therefor, and sequestered the same, it being then on the wharf in front of the steamship Cortez, and after the steamer had given bills of lading therefor. After the legal delays had expired, Delgado & Co. and Clark bonded the property and took it into their possession.

On the nineteenth of February the Louisiana National Bank instituted suit against Thomas Maxwell, sheriff, claiming to be entitled to the molasses in question, as holder and owner of the bill of lading above referred to, and asked for a sequestration of the same, which was ordered. As between Delgado & Co. and Clark and Wilbur & Co. there was judgment in favor of the former by default, regularly confirmed with vendor's lien and privilege on the property sequestered.

As between Delgado and Clark and the Louisiana National Bank, by agreement, the three cases were tried together as in a *concurso*.

There was judgment in favor of Delgado and Clark as against the bank, and the bank has appealed.

Who is entitled to this property—or the bouds which represent it—Delgado & Co. and Clark, the vendors? or the bank, the transferees of the bill of lading given therefor by the steamer Cortez to Wilbur & Co., in whose possession the property was when it was shipped?

Delgado & Co. and Clark rest their rights upon the statute of 1855, incorporated in the 3227th article of the Civil Code, which declares that “any person who may sell the agricultural products of the United States in the city of New Orleans shall be entitled to a special lien and privilege thereon, to secure the payment of the purchase money, for and during the space of five days only after the day of delivery; within which time the vendor shall be entitled to seize the same, in whatsoever hands or place they may be found, and his claim for the purchase money shall have preference over all others.”

The bank relies upon the sixth section of the act of 1868, p. 194, which enacts: “That cotton press receipts given for any goods, wares, merchandise, grain, flour or other produce or commodity stored or deposited with any cotton press, wharfinger or other person, or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company, may be transferred by indorsement thereon, and any person to whom the same may be transferred shall be deemed and taken to be the owner of the goods, wares, merchandise, grain, flour or other produce or commodity therein specified, so far as

Delgado & Co. v. Wilbur & Co.; Clark v. Wilbur & Co.; Louisiana National Bank v. Maxwell.

to give validity to any pledge, lien or transfer made or created by such person or persons," etc.

In our opinion the law is with the bank. The statute quoted is only the legislative sanction given to the commercial law, of universal application, we believe, that a bill of lading, legally transferred, gives title to the property it represents. 1 An. 80; 11 R. 140; 3 Kent's Commentaries 282; 1 Peters 386. But the conclusion to which we have come, does not, in our opinion, clash with the privilege granted by the 3227th article of the Civil Code.

We do not think that the article in question gives any privilege upon produce which is sold for cash. A sale for cash means that when the property is delivered the money is to be paid; no term of payment is agreed upon; it is the giving of money and the taking of the article sold, and the two acts are simultaneous. In this case it is admitted that the sale was for cash, and that the property was delivered to the purchaser on the day of sale. So long as the property remained in the possession and under the control of the vendees, as between the parties, the vendor's lien remained, but the lien does not follow it when it passes into the hands of innocent third parties. Nor can the vendors complain. If they sold for cash, and still allowed the purchaser to take off the goods without paying for them, the fault was with them; the fault being with them, the loss, if any, must be theirs. It is admitted, it is true, that the price was not paid at the time of sale; but it is not shown that this fact was known to the bank at the time it took the transfer of the bill of lading and advanced its money thereon. In law, and in fact, Wilbur & Co. were the owners, in possession, of the property when it was shipped; they were the holders and owners of the bill of lading which represented it; there was no impediment in the way of their transferring it; they did transfer it, for value, and their transfer vested the property in the bank, to be held by it until the bill of exchange for \$1800, with interest, be paid.

It was agreed between the parties that if the bank's title be maintained, judgment is to be rendered in its favor against Delgado & Co. and S. B. Clark for the amount of the bank's debt, according to the agreed valuation of the property which they respectively received, viz., \$2023 80, the value of the seventy-one barrels released to Delgado & Co., and \$231 31, the value of the eight barrels released to S. B. Clark.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the Louisiana National Bank and against Delgado & Co. condemning them to deliver to the said bank the seventy-one barrels of molasses released to them in the suit of Delgado & Co. v. Wilbur & Co., No. 2667 of the docket of the Seventh District Court,

Delgado & Co. v. Wilbur & Co.; Clark v. Wilbur & Co.; Louisiana National Bank v. Maxwell.

or in default thereof that there be judgment in favor of said bank and against Isaac Delgado and Samuel Delgado *in solido*, condemning them to pay to the said Louisiana National Bank eighteen hundred dollars, with interest at the rate of five per cent. from the eighth February, 1870, until paid, and costs.

And it is further ordered, adjudged and decreed that there be judgment in favor of the Louisiana National Bank and against S. B. Clark, condemning him to deliver to the bank the eight barrels of molasses released to him in the suit of S. B. Clark v. A. C. Wilbur & Co., No. 2668 of the docket of the Seventh District Court, or in default thereof that there be judgment in favor of the Louisiana National Bank and against the said S. B. Clark, condemning him to pay to said bank two hundred and thirty-one dollars and thirty-one cents; the judgments as to each to be satisfied on payment of the debt, interests and costs due the said bank, appellees to pay the costs of appeal.

LUDELING, C. J. I concur in the decree made in this cause solely on the ground that a third party can not be prejudiced by a privilege not recorded. Constitution of 1868, 123.

HOWELL, J. I concur for the reason given by the Chief Justice. Rehearing refused.

No. 3700.

JOSEPH FUENTES and al. v. MYRA CLARK GAINES.

Where the judge of the Second District Court, parish of Orleans, had refused to transfer a cause to the Circuit Court of the United States, because that court has not jurisdiction to try the principal, if not the only object of the suit, which was the legality and sufficiency of the evidence upon which a lost will was admitted to probate, and the revocation of said will;

Held—That the United States are without jurisdiction in probate matters, and that this point is too well settled to be now questioned.

It is equally well settled that it was not intended to extend the jurisdiction of the United States courts over causes brought before them on removal beyond the limits prescribed by their original jurisdiction.

The subject matter of this suit is purely probate in its character, to wit: The revocation of the probate of a will, and the suit was properly brought, *under the circumstances of the case*, in the probate court which had made the order to record and execute the will.

Where parties can not attack the probate of a will in the Circuit Court of the United States, before which the petitory action against them has been brought, they should be permitted, *ex necessitate rei*, to bring the suit in the State probate court in which the order for probate was granted. Otherwise, it would be possible for a will to be fraudulently probated, and a suit to be instituted against persons in possession under titles from the heirs in the Circuit Court of the United States, without the possibility on the part of the possessors to expose the fraud.

Where, in a judgment, the court that rendered it carefully guarded against any inference being drawn that the decree should not be open to attack by a direct action in the name of interested third parties, the plea of *res judicata* does not lie.

25	85
48	1000
49	108
25	85
50	607

Fuentes and al. v. Myra Clark Gaines.

An *ex parte* order admitting a will to probate is not a judgment binding upon those who are not parties to the proceeding. The *ex parte* order for the recording and execution of the will is a preliminary proceeding for the administration of an estate, if not a *final judgment* which concludes every one. It is a mere *license* to authorize the executor or heir to carry out the provisions of the testament; and the verity and validity of the will must be established whenever questioned by third persons from whom property is judicially demanded under the will.

The objection to the irrelevancy of evidence is a very weak one when the case is tried without the intervention of a jury. In such a case, the only question, in effect, is upon the sufficiency or weight of the evidence. If the evidence found in the record is irrelevant, it will be ignored by the court.

Objections not stated in a bill of exceptions will not be considered by this court.

Article 613 of the Code of Practice, concerning prescription, clearly refers to a *judgment in a contested suit*, but which has been obtained through fraud, or because the defendant had lost the receipt given by the plaintiff. Article 1994 Civil Code applies to acts made in fraud of creditors.

Article 3542 Civil Code refers to actions for the nullity of testaments when the instituted heir is in possession of property under the will, and is sued by the heirs at law to annul the will and to take from the instituted heir the property. It does not apply to a case in which the defendant in a chancery suit is obliged to come to the probate court to establish a part of his defense in consequence of the limited jurisdiction of the Circuit Court of the United States.

Where the property in controversy is situated in Louisiana, within whose limits the owners thereof reside, their rights can only be barred by the laws of this State, which are binding on the Federal as well as the State courts. The Federal courts do not claim to bring foreign laws into this State.

The validity of a probated will is immaterial to third parties until they are disturbed under it in the possession of their property, and prescription against them could not begin to run until the cause of action had arisen; nor can prescription run against one in possession.

Where a will, when last seen, was in the possession of the testator, and it could not be found at his death, the presumption of the law in such a case is, that the testator destroyed it *animo cancellandi*, and the *onus* of rebutting this presumption is cast upon those seeking to establish the will. The opinions or suspicions of a witness can not overcome the presumption raised that the testator himself destroyed the will.

The contents of a lost will can not be proved by witnesses who derived their knowledge from the verbal declarations of the testator. It would practically authorize the making of a verbal testament, and a lost testament could thus be proved by evidence which would be incompetent to prove the will if produced in court.

It is necessary to prove that a lost olographic will contains all the essentials prescribed by law before it can be admitted to probate, to wit: That it was *wholly written, dated and signed by the testator*, and the witnesses must state the *facts* which are necessary to enable the court to determine whether or not the will is valid.

It is essential to specify the *day, month and year* to give a date to a testament in the sense of article 1588 of the Civil Code.

The facts required to be established by article 1655 Civil Code for the probating of an olographic will must be proved by competent testimony, and can not be inferred by the court.

A PPEAL from the Second District Court, parish of Orleans. *Collens*, judge of the Seventh District Court, presiding in place of *Duvigneaud*, J., who recused himself. *Miles Taylor* and *J. McConnell*, for plaintiffs and appellees. *Fellows & Mills, Race, Foster* and *E. T. Merrick*, for defendant and appellant.

Justices concurring: *Ludeling, Taliaferro* and *Wyly*.

Howell, J., dissenting.

LUDELING, C. J. This is an appeal from a judgment of the Second District Court of the parish of Orleans, which revoked and declared invalid the will probated in 1856, as the will of Daniel Clark of 1813.

Fuentes and al. v. Myra Clark Gaines.

Joseph Fuentes and seventy-five other persons, named in the petition, allege that Myra Clark Gaines made application to the said Second District Court, on the eighteenth day of January, 1855, for the probate of an alleged lost will of Daniel Clark, dated July 13, 1813, and that upon hearing she obtained from this court an order by which said pretended lost will was recognized as the last will and testament of Daniel Clark, and it was ordered to be recorded and executed as such. The petitioners aver that the said order or decree was obtained *ex parte*, and that by its terms it authorized any person, who might at any time become entitled to do so, to contest the said will and the probate thereof, and to show that no such will was executed, either in a direct action or as a means of defense, by way of answer or exception whenever the said will should be set up as a muniment of title. They aver that the said Myra Clark Gaines has, since she obtained the probate of said will, instituted suit against them in the Circuit Court of the United States in the State of Louisiana, in which suits she sets up said will as a muniment of title as the instituted heir of Daniel Clark, and she claims and demands from them sundry tracts of land and properties of large value. They allege that they can not contest the validity of said pretended will of 1813, in the Circuit Court of the United States, on account of the peculiar jurisdiction of said court, so long as the order of probate remains uncanceled by the Second District Court.

They allege that the probate of the pretended will of 1813 was a gross fraud upon the rights of petitioners, that the will never existed, that the evidence and testimony of the witnesses, upon which the will was probated was false or erroneous, illegal and insufficient. That if any will was made by the said Daniel Clark at any time other than the one admitted to probate and ordered to be executed by a decree of the Probate Court, dated on the seventeenth day of August, 1813, which is expressly denied, it was destroyed or suppressed by Daniel Clark himself. They allege that Clark left no will whatever posterior to that dated May 20, 1811, which was probated in the Probate Court of the parish of Orleans on the seventeenth of August, 1813, by which Mary Clark, the mother of Daniel Clark, was instituted his universal legatee, and which probate and will remained in force, for nearly half a century, as the basis of title to the property of the succession of Daniel Clark.

The petition then represents that Daniel Clark was never married; that he had no legitimate child; that he never recognized Myra as his legitimate child; that he made ample provisions for her as his illegitimate child by secret trusts, which trusts were duly executed by those confided with the property intended for her; and that Clark did not make and could not have made a will in favor of Myra, on account of her status, as the law of Louisiana forbade it.

They pray that the will of 1813 may be revoked, and that the probate thereof may be recalled and annulled. Mrs. Myra Clark Gaines, *in limine litis*, prayed for the transfer of this cause to the Circuit Court of the United States, alleging that she is a citizen of the State of New York, and that the matter in controversy exceeds five hundred dollars. She made the affidavit and gave the bond required by law. Her application having been refused, she again applied to have the cause transferred to the Circuit Court of the United States, under the act of Congress dated second March, 1867, and her application was a second time denied. On the tenth of January, 1870, Mrs. Gaines filed the plea of *res judicata* against the city of New Orleans. On the eighteenth of January she filed an application for the recusation of the Judge of the Second District Court, and he recused himself. On the twenty sixth of March, 1870, she filed the following exceptions: That the Second District Court had no jurisdiction or right to proceed further with this cause, after her said applications to have the cause transferred to the Circuit Court of the United States. "That this court is not vested with jurisdiction of this suit, in this that the defendant is the heir at law and universal legatee of Daniel Clark, and in possession, and that the constitutional and legal jurisdiction of this court is confined exclusively to probate jurisdiction, and does not extend to a jurisdiction of this cause, either as regards the parties thereto or the subject matter of said suit." She further excepts that the plaintiffs have been improperly joined, in instituting this suit. That they have not shown in themselves any authority or legal interest in and to the succession of Daniel Clark, either as heirs, legatees or otherwise, and they are thus without right to contest the legitimacy of the defendant as heir of Daniel Clark, and thus without right to contest the validity of said will of Clark, and the defendant's rights under the same. She excepted that the allegations, charging fraud, error, illegality and insufficiency in the evidence upon which the will of 1813 was admitted to probate, are vague and indefinite, and not sufficiently clear to enable defendant to know as against what evidence or what particular testimony of any of said witnesses she is required to defend her rights against said alleged fraud, error, illegality or insufficiency. She further excepts that the court has not jurisdiction to try the question of her *status* inasmuch as that question was decided by the Circuit Court of the United States, in the suit of Myra Clark Gaines v. City of New Orleans and others, instituted in the Circuit Court of the United States for the Fifth Circuit, and the then Eastern District of Louisiana, No. 2695, which decision she alleges is *res judicata*.

The judge *a quo* maintained the exception so far as to require the plaintiffs to amend their petition in that part charging "fraud, error, illegality and insufficiency in the evidence," etc., and he overruled the

other exceptions. On the twenty-eighth of April, 1870, the petition of intervention of Rudolph Huberwald and others was filed. On the seventh of May, 1870, the intervention of John and James C. Davidson was filed.

On the eleventh of February, 1871, in obedience to the order of the court, the petitioners filed their supplemental petition, setting forth specifically the grounds for their allegations of fraud and error, and designating particularly the alleged illegality and insufficiency of the evidence on which the will was probated, etc.

On the twenty-ninth of April, 1871, she filed her answer. It admits the probate of the will of 1813, but denies that the evidence and testimony upon which the will was admitted to probate was false, erroneous, illegal or insufficient. She denies that the plaintiffs or intervenors or any of them allege any right of action to contest the validity of the order of probate, or to seek the revocation of the will of Clark of the thirteenth July, 1813, and she avers that that decree has acquired the force of *res judicata*. She further pleads the prescription of one, three, five and ten years.

On the third of June following, she filed the plea of *res judicata* as to all the parties, on the question of her status.

This record, consisting of 575 pages in manuscript and portions of six printed volumes, furnishes proof of the patience and care with which this case has been tried. During the course of the trial, upwards of thirty bills of exceptions were signed. The elaborate arguments, oral and by briefs of counsel, exhibit great labor, research and ability; and they have greatly lessened the labors of this court.

In this court the counsel for the defendant have filed an assignment of errors, which groups together the questions, which they deem important in this case. They are substantially as follows:

I. That the Second District Court was without jurisdiction to try the cause, after the defendant had made her application to have the cause transferred to the Circuit Court of the United States.

II. That said Court was without jurisdiction on account of the subject matter of the suit.

III. That the plaintiffs and intervenors allege no interest in the estate of Daniel Clark, which could authorize them to institute a suit to revoke the last will of Daniel Clark.

IV. That said court erred in denying the authority of the thing adjudged to the decrees of the Supreme Court and Circuit Court of the United States as set forth in defendant's several pleas of *res judicata*.

V. That said court erred in receiving and rejecting evidence as shown by the several bills of exceptions.

VI. That said court erred in overruling defendant's pleas of prescription.

VII. That the court erred in deciding said cause in favor of the plaintiffs and intervenors.

We will take up these questions in their order.

First—We are of opinion the judge *a quo* properly refused to transfer the cause to the Circuit Court of the United States, because that court has not jurisdiction to try the principal if not the only objects of this suit, the legality and sufficiency of the evidence upon which the lost will was admitted to probate, and the revocation of the will. That the United States Courts are without jurisdiction in probate matters is too well settled to be now questioned. 9 Peters 174, *Tarver v. Tarver*; 2 Harv. 619; *Gaines v. Relf & Chew*, and 6 Wal. 642, *Gaines v. New Orleans*.

And it seems equally well settled that "it was not intended to extend the jurisdiction of the United States Courts over causes brought before them on removal beyond the limits prescribed by their original jurisdiction." Conklin 155; 2 Sumners 338.

Second—The subject matter of this suit is purely probate in its character, to wit, the revocation of the probate of a will; and the suit was properly brought, under the circumstances of this case, in the Probate Court, which had made the order to record and execute the will. 13 An. 138, 177; 1 La. 19, *McCombs v. Dunbar, et al*; 8 N. S. 520, *Harty v. Harty*; 5 La. 394; 5 Rob. 286; 1 An. 171; 17 La. 4.

Third—The plaintiffs and intervenors substantially allege that they have been sued, by Mrs. Gaines, for property, which she alleges belonged to the succession of Daniel Clark, and of which they are in possession; that she claims the same under the will of Clark, dated thirteenth July, 1813; that Clark left no other testament than that dated twentieth May, 1811, by which Mary Clark, his mother, was instituted heir, and that that will has been the basis of title to the property of his succession for nearly half a century. And the bill in equity of the said Myra C. Gaines against these parties alleges that they (the plaintiffs in this suit) sometimes "pretend that one Richard Relf and one Beverley Chew sold said property to the defendants as testamentary executors of a will of said Daniel Clark, made in the year 1811, which had been admitted to probate in the Probate Court for the parish and city of New Orleans, and as attorneys in fact for one Mary Clark, the devisee in said will of 1811 named," etc. And in the letter of Mrs. Gaines to the Mayor of New Orleans, dated sixth September, 1870, claiming from the city \$4,996,039 32 cents, and proposing to compromise for \$4,000,000, she gives a history, or the chain, of title back to the estate of Clark. These admissions show that they are in possession under titles derived from Relf & Chew either as executors of the will of Clark or as the attorneys in fact of Mary Clark, the forced heir, and universal legatee under the will of 1811, of Daniel Clark.

They are interested therefore to show that the will of 1813 is not valid, when it is opposed to them as a muniment of an adverse and better title to property in their possession.

And as they can not attack the probate of the will in the Circuit Court of the United States, where the petitory action against them has been brought, they should be permitted, *ex necessitate rei*, to bring this suit in the probate court, in which the order for probate was granted; otherwise, it would be possible for a will to be fraudulently probated, and then to sue persons in possession under titles from the heirs, in the Circuit Courts of the United States, without the possibility on the part of the possessors to expose the fraud. See 13 An. 138; 177; 5 La. 394. *Lewis' Heirs v. His Executors*, 17 La. 4; *Roberts v. Allier's Agent*.

Fourth—It is urged that the court *a qua* erred in not holding that the order, probating the will of thirteenth July, 1813, is *res judicata*.

It would seem from the decisions of this court, reported in the thirteenth volume of the *Annals*, pages 139 and 178, that this question was definitely settled.

In the case of the heirs of Mary Clark v. Myra C. Gaines, the court said: "The decree of the Supreme Court, which it is the object of this suit to annul, is one which, upon its face invited contestation; for it reserves by its terms the right to attack the will probated, not only to all persons who were not parties to the proceedings for the probate of the will, but even to one who was a party to those proceedings."

* * * "To refuse, therefore, to the plaintiffs the right of action to set aside the probate of this will, would be, in fact, to deny them the remedy which the very decree of probate purported to secure to them. It is not in this court such an agreement should meet with favor. Our decree in the case of the succession of Clark, 11 An., meant what it expressed. Our reservation of the rights of all parties in interest was substantial, not illusory."

And in the case of *De la Croix v. Gaines*, the court said: "By referring to the case of Clark's succession in 11 An. it will be seen that we carefully guarded against any inference being drawn that the decree should not be open to attack. We even asserted that it would be open to attack by a direct action in the name of a party interested. And if, as alleged (and we must at this stage of the case take the allegation for the truth), the defendant is seeking to avail herself in the courts of the United States of a rule there recognized, that an *ex parte* decree probating a will, although open to question collaterally, in all the courts of the State where it was rendered, is not to be so questioned in a United States court, but it is to be conclusive upon all the world, there is a manifest propriety in giving the relief, which was reserved by the very terms of our former opinion and decree to third persons, whose interest might be sought to be affected by it."

But if we leave out of view what has been expressly decided in regard to the effect of the probate of the will in question as to third persons, and test the question by the jurisprudence of this State and of other countries on the subject, we will arrive at the same conclusion, to wit: that an *ex parte* order, admitting a will to probate, is not a judgment binding upon those who are not parties to the proceedings; that the *ex parte* order for the recording and execution of the will is a preliminary proceeding for the administration of an estate, and not a final judgment which concludes any one; it is a mere license to authorize the executor or heir to carry out the provisions of the testament, and the verity and validity of the will must be established whenever questioned by third persons, from whom property is judicially demanded under the will. 10 Mart. 1; 7 N. S. 470; 2 La. 26; 11 La. 388, 395; 12 La. 214; 17 La. 4, Robert N. Allier's agent; 2 An. 724; 4 An. 570; Succession of Dupuy; 1 Rob. 115, Rachal et als v. Rachal et. als; Marcadé, vol. 4; Tit. 11 Donations et Testaments, art. 970, No. 18, p. 12; Code of Practice, art. 943.

"A will" says Jarman, "is proved in common form where the executor presents it before the judge, and in the absence of and without citing the parties interested, produces witnesses to prove the same. Upon the testimony of these witnesses that the will exhibited is the true, whole and last will and testament of the deceased, and sometimes upon less proof and even upon the oath of the executor alone, the judge grants probate thereof. This mode of proof, though not in very common use, is still adopted and practiced upon in some of the United States. * * * But it is not conclusive upon heirs or distributees and may be opened and set aside, if necessary, and applied for in time. At common law, when a will had been proved only in common form, without notice to those interested, the probate might be re-examined within thirty years after probate."

We have seen that the judges who rendered the decision probating the will of 1813 did not themselves consider it binding on any one; that it was a mere license to Myra Clark Gaines to sue. Without a probate of the will she could not have gone into another court to sue for property as the instituted heir of Clark; with the probate she could sue and claim property under the will, but those to whom she opposed this will could deny that such a will existed when Clark died; that the probate was made on legal or sufficient evidence, and that the will was valid under the laws of Louisiana; and the onus of proving these facts would devolve upon the party who asserted the validity of the will. Marcadé, vol. 4, p. 12; 13 An. 86. It appears from the opinion in the case of De la Croix v. Gaines, 13 An., as well as from the probate record in evidence in this suit, that there were parties who came forward to contest the existence and the validity of the will of

1813, when Myra C. Gaines had it probated, but they were refused the right to contest its validity or existence, on the grounds, substantially, that their interest was not affected by the probate; that when they were disturbed in their possessions it would be time enough for them to oppose the probate of the will.

If this ruling was correct then, how can it be pretended that the probate proceedings are binding on them now? Is it possible that a system of jurisprudence exists anywhere, which would allow a claimant to obtain an *ex parte* judgment, which would have the effect of destroying the titles of persons who never had notice of the claim—nay, of persons who were refused the right to contest the claim in the very proceedings wherein the *ex parte* order was made?

We think not; certainly it does not exist in Louisiana; and the judge *a quo* correctly overruled the first plea of *res judicata*.

It is next contended that the plea of *res judicata* against the city of New Orleans should have been maintained. The thing demanded in the former suit is not the same as that claimed in this action. "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality." C. C. art. 2286. We deem it unnecessary to pass upon the other plea of *res judicata*, based upon the supposition that the Supreme Court of the United States has decided and fixed the status of Myra C. Gaines in *Gaines v. Hennen*, etc. If it be true that the Supreme Court of the United States have decided the question relative to her status, independently of the will of 1813, that august tribunal will no doubt adhere to that opinion. But we do not consider that question properly involved in this suit.

Fifth—It is not necessary to pass upon most of the bills of exceptions taken in this case, as they relate to evidence affecting the status of the defendant—which we do not consider necessary to decide, in consequence of the conclusion arrived at on other questions involved in this controversy.

We will remark, in the next place, that the objection of irrelevancy, urged to so much of the evidence offered, is a very weak objection, when the case is tried without the intervention of a jury. In such a case the only question, in effect, is upon the sufficiency or weight of the evidence. If any evidence be found in the record which we consider not relevant we will ignore it. 1 Greenl. 53.

There was no error in ruling the defendant to go to trial, without waiting for the intervenor, Elmore. The intervenor seems to have consented to let the trial proceed without him—at any rate he has not objected.

The defendant excepted to the reception of a translation of a letter from J. D. D. Bellechasse to D. W. Coxe, dated December 10, 1819, found in the record of the suit of Myra Clark Gaines v. City of New Orleans, and in connection therewith and to prove the loss of the original, its genuineness as a true copy or translation of the original, the deposition of W. Cope and G. B. Duncan, and the indorsement thereon made by F. Perrin, solicitor for Mrs. Gaines. It is shown that said translation was admitted in evidence in the above named suit, as a correct translation of the original letter, which was admitted by Mrs. Gaines' solicitor to be genuine, and Cope, who made the translation, swears it was correctly translated. It is alleged that the original letter is lost; it is not proved to be in existence, and it is quite certain it never was in the possession of the plaintiffs. Bellechasse was interrogated in regard to this letter, and he challenged its production. We think it was properly received in evidence in this case, as it was the best evidence which the nature of the case would admit of.

In regard to the bills of exception taken by the defendant to the rulings of the court striking out portions of the testimony of Boistontaine and others, on the ground that the testimony was hearsay, we concur with the judge *a quo*.

A bill of exceptions was taken to the ruling of the judge admitting a letter written by Mazureaux to Coxe in May, 1842. The grounds stated in the bill of exceptions are, that, Mazureaux was alive during the pendency "of the litigation in the United States Court, and after issue joined in that suit, so that his direct testimony could have been taken." "He was counsel of record opposed to Myra Clark Gaines in the United States Court." "The status of Mrs. Gaines can not be inquired into in this case." "The letter contains (besides the facts stated) expressions of opinions which are not evidence."

We have already said we will not pass upon the question relating to the status of the defendant, further than it may be affected by our judgment in regard to the will of 1813. In so far as that letter contains opinions of the witness, it is not competent evidence. But we agree with the district judge that the other objections are not reasons for rejecting the evidence, even if we overlook the vagueness of the objections. But the counsel for the defendant have urged in their briefs and oral arguments other objections to the evidence. It is well settled that objections not stated in a bill of exceptions will not be considered by this court. We could as well be required to reject evidence which had been received without objection in the court of the first instance. A bill of exceptions was taken to the reception in evidence of the answers of Richard Relf to the bill in chancery in the case of Gaines and Husband v. Relf, Chew et als, filed in January, 1845, on the grounds following:

That judgment of the Supreme Court probating the will could not be attacked "after the lapse of time;" that the status of Mrs. Gaines had been decided by the Federal Courts, and the plaintiffs have no right or authority to question her status; that the said Relf & Chew "were not interrogated under oath," and their answers were put at issue by a replication, that the answers "were *post litam motam*;" that it is contrary to law and evidence that the allegations of a party in his own favor should be read in evidence by other persons not parties to such controversy, and because answers in chancery are not admissible in evidence; because the defendant was and is deprived of the benefit of cross-examining said Relf, and because there is no obligation on a suitor to offer testimony, which she believes to be false, erroneous and untrue; that the testimony is *res inter alios acta* and irrelevant.

In order to act intelligently in receiving or rejecting this evidence, it will be necessary to bear in mind some of the facts disclosed by the voluminous records, containing the history of the remarkable litigation relative to the will, which forms the subject of this suit. In June, 1834, Myra Clark Whitney (now Gaines) instituted proceedings to revoke the testament of Daniel Clark, dated twentieth May, 1811; and to probate his alleged lost will of thirteenth July, 1813. The plaintiff in that proceeding took the testimony of Mr. and Mrs. Harper, S. B. Davis, Bellechasse, De la Croix, Boisfontaine and others by commission, and in 1836 when the heirs of Mary Clark, the universal legatee under the will of 1811, and the mother of Daniel Clark, and Relf & Chew, the executors of that will, insisted upon proceeding with the trial, submitted to a nonsuit rather than try the case.

In 1845 Mrs. Gaines instituted a suit against Relf & Chew, and others for the property of the succession of Clark, claiming as the legitimate heir and as the instituted heir under the lost will of Daniel Clark. A demurrer was filed to the bill in equity, and subsequently an answer was filed by the said Relf & Chew. The case was brought before the Supreme Court of the United States on the demurrer by a division of the judges on certain points, which were certified under the act of Congress. The opinions of the judges were opposed on the following points:

1. Is the bill multifarious? and have the complainants a right to sue defendants jointly in this case?
2. Can the court entertain jurisdiction of this case, without probate of the will set up by the complainants, and which they charge to have been destroyed or suppressed?
3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law?

The court said "the demurrer is not before the court, but the points certified. In considering these points all the facts stated in the bill are admitted."

The court having held that the circuit court could not establish the lost will, said: "A deliberate consideration of the question leads us to say that both the general and the local law require the will of 1813 to be proved before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants in regard to the above will. The answers, being obtained, may be used as evidence before the court of probate to establish the will of 1813 and revoke that of 1811. In order that the complainants may have the means of making, if they shall see fit, a formal application to the probate court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained." 2 How. 646. In 1848, about three years after the decision on the demurrer, Mrs. Gaines filed an amended bill, in which among other things she said, "And your orator and oratrix further show unto your Honors, by way of amendment to said bill, that they will renounce for all the purposes of this suit against the defendants herein named, all claims, which your oratrix has heretofore made to the estate of said Daniel Clark, as his universal heir and devisee by the said will of 1813, and that she will, as against the defendants herein named, assert and maintain her right, title and equity, to the four-fifths part of the property and rights embraced in this amended bill and supplement, as the forced heir of the said Daniel Clark, deceased," etc. Vol. 2 N. O. Record p. 78. And availing herself of the right given to her by the court, she propounded divers questions to the defendants.

This suit was finally decided against Myra Clarke Gaines in 1852. 12 How. 539. On the eighteenth of January, 1855, Mrs. Gaines filed in the Second District Court of the parish of Orleans, her petition praying for the probate and execution of the will of 1813. The city of New Orleans, F. D. De la Croix and Richard Relf filed interventions, and prayed to be allowed to contest the probate of the will. Mrs. Gaines excepted to their intervention, on the ground "that a probate of a will is a proceeding to be had *ex parte*, a mere preliminary step in the administration of an estate not binding on third parties, and open to contestation in any proceeding based upon its validity, in which it is relied upon as the basis of title, or of any right asserted as against third parties; and on the further ground, that the intervening parties are without interest in the subject matter before the court, and therefore can not be permitted to embarrass the proceedings." And the interventions were dismissed. Now the evidence objected to is the answers of Richard Relf to the bill in equity filed by Myra Clark Gaines, to obtain which the Supreme Court of the United States said it would maintain the jurisdiction of the Circuit Court,

notwithstanding the demurrer was technically correct, in order that said answers might be used in evidence on the probate of the will of 1813. The answers were sworn to. The complainant had full opportunity to question Relf upon the subject matter of the lost will, and the present suit is between the *ayant cause* of the defendants in the suit, in which said answers were made. But complete mutuality or identity of parties is not necessary. "It is generally deemed sufficient" says Greenleaf, "if the matters in issue were the same in both cases, and the party, against whom the deposition is offered, had full power to cross-examine the witness. Thus, where a bill was pending in chancery, in favor of one plaintiff against several defendants, upon which the court ordered an issue of *devisavit vel non*, in which the defendants in chancery should be plaintiffs and the plaintiffs in chancery defendant, and the issue was found for the plaintiffs—after which the plaintiff in chancery brought an ejectment on his own demise, claiming, as heir at law of the same testator, against one of those defendants alone, who claimed as devisee under the will formerly in controversy, it was held, that the testimony of one of the subscribing witnesses to the will, who was examined at the former trial, but had since died, might be proved by the defendant in the second action, notwithstanding the parties were not all the same; for the same matter was in controversy, in both cases, and the lessor of the plaintiff had precisely the same power of objecting to the competency of the witness, the same right of calling witnesses to discredit or contradict his testimony, and the same right of cross-examination, in the one as in the other. * * * The same rule applies to privies, as well as to parties." 1 Greenl. §§ 553, 554.

The same author says: "And though the two trials were not between the same parties, yet, if the second trial is between those who represent the parties to the first, by privity in blood, in law, or in estate, the evidence is admissible. And if, in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point or fact in another action between the same parties or their privies, though the last suit be for other lands." 1 Greenl. § 164. 7 Rob. 440.

Relf had died before the institution of this suit. If he had been living he would have been a competent witness in the case. But his sworn declarations in answer to charges propounded against him by the said Myra C. Gaines, are in existence in that suit. The Supreme Court said his answers might be used as evidence to probate the will of 1813; and the said Gaines has had full power and opportunity to question and cross-question him. It is difficult, therefore, to see any substantial reason, why the evidence can not be used, by those who have an interest to prove no such will existed at the death of Clark.

The great length of time that intervened between the death of Clark, nay, between the period when the defendant reached her majority, and the institution of the proceedings to probate the will of 1813, in 1834 and 1855; the fact that on those occasions she declined to contest the validity of the will with those who held property under the will of 1811, who were ready to try the issue with her; and the further fact that the plaintiff did not have an opportunity to show that the will was invalid or not legally probated, until after their possessions were disturbed by the suits in the United States Circuit Court, instituted since the death of Relf, are circumstances which incline us to receive the evidence. The general rule, that the best evidence the nature of the case will admit of would seem to decide this question. "It is only another form of expression of the idea that if one loses the higher proof, he may use the next best in his power. The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault." 2 La. 168.

Over forty years after the death of Clark, long after his contemporaries had passed off the stage of life, the plaintiffs are obliged to attack the will set up by defendant as the muniment of her title to lands in their possession under titles derived from his succession. We are of opinion that the answers should have been received.

Sixth—The plea of prescription was properly overruled.

The prescription, upon which counsel in their briefs appear to rely, is that of one and five years, and they cite articles 1994 and 3542 Ray's C. C. and article 613 Code of Practice. This article of the code of practice clearly refers to a judgment in a contested suit, but which has been obtained through fraud, or because the defendant had lost the receipt given him by the plaintiff. Article 1994 of the Civil Code applies to acts made in fraud of creditors. Article 3542 refers to actions for the nullity of testaments, when the instituted heir is in possession of property under the will, and is sued by the heirs at law to annul the will, and take from the instituted heir the property. It does not apply to a case of this kind, in which a defendant in a suit in chancery is obliged to come to the Probate Court to establish a part of his defense in consequence of the limited jurisdiction of the Circuit Court or the United States.

The maxim "*Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum*" is applicable to this case. If the petitory action, instituted in the Circuit Court, had been filed in one of the district courts of this State, no one would pretend that the defendants could not attack the will and ask for judgment annulling it. She can not deprive them of that right by suing in the Circuit Court. Their rights can be barred only by the laws of Louisiana, where they reside, and where their property in controversy is situated, which are obligatory on the Fed-

eral as well as State courts; the Federal courts do not claim the right to bring foreign laws into this State. The only right which the plaintiffs in this suit have to attack this will is because they are disturbed in the possession of their property by the suits in chancery aforesaid. Until they were sued in the Federal court they had no cause of action. It was immaterial to them how many wills were probated, unless they were disturbed in the possession of their property, and prescription against them could not have run until their cause of action had arisen. Nor can prescription run against one in possession. There is no foundation for the plea of prescription; and we concur in the views of the judge *a quo*, when he says: "If the prescription of five years could run against one having and tracing undisturbed possession from 1815 down to the time his right is first attacked in 1865, say fifty years, then success is assured by law to a fraud easily and safely practiced. It would suffice, in any old and almost forgotten succession, to probate *ex parte* a spurious and invalid will; wait in masterly inaction during five years, and then sue the previously recognized heirs or their transferees for the property derived from the estate. In vain would they appeal to the fact that the probate was *ex parte*; urge that the law did not give the probate the effect of a public judgment concluding them—claim the right reserved in their favor to contest it; in vain would they offer to prove forgery, bastardy, violation of public policy and morals and infraction of prohibitory law. The plea of prescription, if operating thus silently and insidiously against their quiet possession and title, in favor of one who makes no pretense of possession, would close the door to all investigation, and a demonstrable fraud against the real right, and against the law itself, would be infallibly triumphant. We do not recognize such to be the law or jurisprudence of Louisiana.

Seventh—The last assignment of errors presents the questions involved on the merits of this cause; those we deem important are the following. Did Daniel Clark leave a testament dated on the thirteenth July, 1813? Are the contents of that will proved by two credible witnesses, who read, or had had read to them, the will?

In proving a lost olographic will, with a view to its probate and execution, is it necessary to prove all the essentials of an olographic will? Or, is a paper, containing testamentary dispositions, wholly written and signed by the testator, but dated in July, 1813, without specifying any day, an olographic will? Is it dated?

Can an olographic will be proved, except by those who have a knowledge of the handwriting of the testator, from having often seen him write, and sign his name? And must that knowledge and the source of that knowledge be stated by the witness?

In deciding these questions we would have less difficulty if this court had not, in an *ex parte* proceeding, passed upon several of them.

But, inasmuch as the decision in that case is not binding on the plaintiffs in this suit, it is our duty to examine the questions and to decide them without being influenced, if possible, by what was decided in the eleventh Annual.

Daniel Clark died in the city of New Orleans on the sixteenth day of August, 1813. The *procès verbal* of the magistrate who affixed the seals upon the effects declares: "This day, the sixteenth of the month of August, 1813, and the thirty-eighth of American independence, we, Gallien Preval, one of the justices of the peace for the city and parish of Orleans, were present at the decease of Daniel Clark, this day, at six o'clock in the afternoon, and we were requested by Richard Relf to affix the seals on all the papers belonging to the estate of the said Daniel Clark, for the accomplishment of which, we in the presence of James Pitot and Dussuau de la Croix, the said Richard Relf, having been requested by us to show us the papers of said estate, and having conducted us to the room of said deceased, proceeded, in the presence of the witnesses above named, to remove all the said papers and to place them in a desk and armoire, which we found in the room of deceased, after which we affixed the seals on the doors of the room, and placed Mr. Francisco Morales as guardian of the said room, who promised, under oath, to fulfill well and faithfully the duties of his charge, and has, together with us and the witnesses named, signed the same on the day, month and year above mentioned.

his

"FRANCISCO ✕ MORALES.

mark.

"At the moment of the closing the *procès verbal*, the said Richard Relf having found in a trunk of the deceased the olographic will, we removed it in presence of the witnesses above named for the purpose of delivering it to the honorable judge of the Court of Probates.

"(Signed)

"JAMES PITOT.

"DUSSUAU DE LA CROIX.

"RICHARD RELF.

"GALLIEN PREVAL,

"Justice of the Peace."

Thus it appears that James Pitot, the parish judge, de la Croix, Relf and Francisco Morales, and the justice of the peace, Gallien Preval, were present immediately after the death of Clark—nay at his death—and that the justice of the peace affixed the seals on the effects of the succession according to law.

On the seventeenth day of August, 1813, the olographic will of Clark, dated twentieth of May, 1811, was probated by James Pitot, the parish judge.

On the eighteenth of August, 1813, Francis Dussuan de la Croix filed a petition in the Probate Court of the parish of Orleans, in which he represented that he had strong reasons to believe that Daniel Clark had made a testament or codicil posterior to that which had been opened and probated. "And whereas it is to be presumed that the double of the last will, whose existence was known by several persons, might have been deposited with any notary public of the city," he prayed to have the notaries summoned within twenty-four hours to certify under oath if there existed or not in their offices any testament, codicil, or sealed packet deposited by the said Clark.

The notaries were summoned and they certified that they had no will or codicil of the said Clark. It is not pretended that any body ever saw the alleged last will after the death of Clark. And Boisfontaine alone testifies that Clark spoke of the will in his last illness. Boisfontaine states that Clark spoke to him of his last will repeatedly during his last illness, and he said "his will must be taken care of on her (Myra's) account." Again, "he told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier de la Croix." Is it probable that Clark ever made such statements to this witness? If he felt any uneasiness or doubt about the safety of his will, would he not have had it deposited where it could not have been tampered with. It is proved that the parish judge, Pitot, was named as one of the executors of this will, and that he lived near by Clark. How easily he might have relieved his mind of anxiety about the safety of the will. Is it probable that he could have directed his slave to take his black case and carry it to De la Croix, after his death? He knew that the slave would not have been permitted to take away anything of value from the house after his death. And if he had desired De la Croix to have the will, he would have sent it by his slave during his life.

Again he says, "when, after the death of Clark, the disappearance of his last testament was the subject of conversation, I related what Clark had told me about his will, in his last illness. Judge Pitot and John Lynd told me that they read it not many days before Mr. Clark's last sickness; that its contents corresponded with what Clark had told me about it," etc.

It appears from his testimony and that of Harriet Harper and Bellechasse, that Pitot was one of the executors named in the will, and that in the will was a legacy of five thousand dollars in favor of Judge Pitot's son.

Is it not most wonderful that Judge Pitot who was thus interested, and who believed, according to this witness, that a will had been left by Clark other than the one dated the twentieth of May, 1811, should have probated the said will of 1811 immediately after Clark's death,

and that no effort was made to establish the lost testament during the lives of Judge Pitot or of John Lynd. According to Boisfontaine there were four witnesses alive who had read the will only a short time before Clark's death, and several others who had been told its contents. Judge Pitot was himself one of the witnesses, and John Lynd, one of the notaries summoned to certify if they had such a will, was another, who, it was said, had read the will. Is it probable that Pitot and the other executors of Clark, all personal friends of the deceased, would have failed to make an effort to establish the lost will if the narrative of Boisfontaine had been true?

What amount of reliance is to be placed in the testimony of a witness, who is uncontradicted, who undertakes to give the details of conversations, in themselves not probable, which occurred over twenty years before, it is very difficult to determine. This witness, however, speaks of the conversations which occurred during the last sickness of Clark, and after his death, with a positiveness and certainty that few persons would, in regard to conversations, after the lapse of only a few months. And *to him alone* did Clark speak of his will *during his sickness*. The improbability of the facts detailed by him, and the great length of time which intervened between the period when he testified and the conversations which he details, incline us to attach but little credit to his testimony.

Another remarkable fact is, that although Bellechasse and De la Croix (who were named as executors in the lost will) were with Clark during his last illness, one of them on the day before his death, yet he never mentioned the subject to either of them. They were his cherished personal friends. Boisfontaine was his employe or overseer. De la Croix testified "that after the death of Clark witness was not much surprised that the last will of Clark was not produced or found, for it is to his knowledge that Clark had requested several other persons, as he had deponent, to become his executor," etc. We may fairly infer from this testimony that after De la Croix had had the notaries cited to produce any will or codicil of Clark, deposited with them, and the said notaries had declared under oath that they had no will or codicil of Clark, he and the other friends of Clark adopted the legal presumption that he had destroyed it himself.

That other witnesses had seen a will posterior in date to that of 1811, and that Clark spoke to others about such a will is proved. But it was before his sickness that these witnesses saw the will, or that Clark told them of it.

It is not proved, nor has any attempt been made to prove, that Clark could not have destroyed the will, even after the conversations with Boisfontaine, if they occurred, in which he spoke to Boisfontaine about the will.

When last seen, the will was in possession of Clark, and it could not be found at his death.

The presumption of the law in such a case is, that the testator destroyed it *animo cancellandi*, and the *onus* of rebutting this presumption is cast upon those seeking to establish the will. 1 Redfield on the Law of Wills, 350; 10 Yerger 84; 11 Ala. 596; 6 Wend. 174; 11 Wend. 227; 3 Pick. 67.

There is not a particle of proof in the record to rebut this presumption.

The theory of the witness Bellechasse that Relf destroyed the will is not supported by any evidence. That Bellechasse himself could not have believed the story at the time of the death of Clark and for several years after is abundantly shown, we think, from the confidence he himself reposed in Relf and from the friendly and confidential manner in which he corresponded with him during the year and later after the death of Clark. Either Bellechasse was himself a villain and hypocrite, or he did not believe that Relf was the spoliator he represents him to have been in his testimony, given upwards of twenty years after the occurrences concerning which he testified.

On the ninth of October, 1814, he wrote a letter to Relf, which commenced thus:

"My friend, I have never forgotten you, and your last mark of friendship shows me that the constancy of the misfortune that attaches to everything that relates to you, does not equal your own constancy." * * He concludes the letter thus: "Should you be persuaded that what I have written or said will compromit me, seek an interview with L—, and together engage my family to await me at Pensacola. Neither you, my friend, nor L— shall suffer from advances made for this purpose, as I am in a position to be infinitely useful to you. * * * In the meantime receive my thanks, and believe in the gratitude of your sincere and devoted friend."

In a letter of a subsequent date, he says, "You have yourself to blame, my dear friend, if I have not made a reconveyance of the property that our friend Clark sold to me. I have offered to do so on many occasions, and under some pretext you have always put it off, and permitted me to go without speaking about it." This was in relation to the property placed in Bellechasse's name for the benefit of Myra.

Continuing the letter, he says: "I have, therefore, considered it my duty to write to you, which I now do, and send you the accompanying document, in order to prove that my declaratory act was made before I left Louisiana, and placed in the hands of Pedesclaux. I have preferred this, persuaded that you can do, at little expense, all that can be done; and in order that he can not, in case of a requisition, do any evil, obtain an interview with him, recover from him the documents, for which you will give him your receipt, and all will be finished," etc.

Is it possible that Bellechasse could have thus confided to one, whom he knew or believed to be a villain?

But be that as it may, there is no evidence whatever to establish the truth of the hypothesis, that Relf destroyed the testament. But a letter written by Bellechasse to Relf, in 1822, would seem to indicate more than a doubt as to whether even he believed that the will had been destroyed by Relf, for he says: "Je ne doute pas que si le testament de Clark ne s'était *perdu*, que l'on aurait vu que la partie de ces biens confiés au Chevalier de la Croix, était désignée à M^{lle} Caroline, comme peut l'affirmer Mr. et M^{de}. Harper qui assurent que Clark leur en avait fait l'aveu." But if it be conceded that Bellechasse believed or suspected that Relf destroyed the will, surely the *opinions* or *suspensions* of a witness can not overcome the presumption raised that the testator himself destroyed the will. 3 Phillimon 123. There are other facts in this case which corroborate this presumption. One fact is that Clark left the will of 1811, which was found in his trunk, as stated in the *procès verbal* before mentioned. Another is, that he left in force the secret trusts in favor of Myra. If she was his legitimate child, and he had made a will wherein he had acknowledged her to be such, and constituted her his universal legatee, why did he leave those trusts in her favor unrevoked, and why did he not destroy the former will? The record shows that Clark was an intelligent gentleman. He must have known that the property left for Myra, in the name of Bellechasse and De la Croix, would be subject to judicial mortgages and legal mortgages against those gentlemen, in spite of themselves. Why would he have unnecessarily subjected that property to such risks?

The probability is that he would have destroyed the will of 1811 and the secret trusts aforesaid if he had intended to leave the alleged lost testament. Another fact, which corroborates the presumption of the law, is the absence of any motive on the part of Relf to destroy the will of 1813. The will of 1811 was a sealed will, and until it was opened for the purpose of its probate, Relf could not know what its provisions were. On the whole, we are of the opinion that the presumption that Clark himself destroyed the will has not been rebutted by the evidence offered to establish the will. And we have arrived at this conclusion without giving effect to the answers of Richard Relf or to the letter of Mazureau. In the answers of Relf, however, it is emphatically denied that he ever destroyed, or that he ever saw the will; and his answers repel the idea of the existence of such a will, while the letter of Mazureau shows the motive or reason which may have influenced him in destroying the will.

Are the contents of the lost testament of Clark proved by two credible witnesses, who had read, or had had read to them, the lost will?

Bellechasse, Mrs. Harriet Harper, Boisfontaine and De la Croix are the only witnesses who testify to the existence or contents of the will.

The Chevalier de la Croix said: "Deponent called to see Clark at his house on Bayou Road; he there found him in his cabinet, and *he had just sealed up a packet*, the superscription on which was as follows: 'Pour être ouvert en cas de mort.' Clark threw it down in the presence of deponent, and told him that it contained his last will, and some other papers which would be of service; deponent did not see the will; does not know anything about its contents; he only saw the packet with the superscription as before related."

Boisfontaine says: "Deponent never saw the last will of Clark; he only saw the package when Clark showed it to Mr. De la Croix."

Bellechasse saw the will, but he never read it. We infer this from his own testimony. He says, in his testimony given in December, 1834. "He (Clark) told the deponent, that he had completed or finished his last will, that the deponent, Judge Pitot, then present, and the Chevalier de la Croix were his executors named in it (the deponent having given his consent before), and that apart from some legacies for his friends, and a due pension for his mother, his said daughter, Myra, was the heiress of his fortune, duly habilitated for that purpose, and gave the said will open to us to look at and examine. The deponent saw that it was all in his own handwriting and signed by him, the said Daniel Clark." To cross-questions he answered, "That the aforesaid last will of 1813 of said Daniel Clark was shown by him, of his own accord to deponent, and also Judge Pitot at the time mentioned in his answer in chief," etc. And again, he answered, "that although he took neither note nor copy of said will of 1813, yet from the interesting nature of those details that he (Clark) had given of it, he had those details strongly impressed on his memory."

In answer to another set of interrogatories filed in 1837, Bellechasse says: "A very short time before the sickness that ended in his death, he (Clark) conversed with us about his said daughter, Myra, in the paternal and affectionate terms as theretofore; he told us he had completed and finished his last will. He (Clark) therefore took from a small black case his said last will, and gave it open to me and Judge Pitot to look at and examine. It was wholly written in the handwriting of said Daniel Clark, and was dated and signed by the said Clark in his own handwriting. Pitot, De la Croix and myself were the executors named in it, and in it the said Myra was declared to be his legitimate daughter, and the heiress of all his estate." In answer to a cross-interrogatory he answers: "My knowledge of English is limited; but as I have three daughters, one son, and two sons in law, who understand it, and some of them perfectly well, when I require an English translation I avail myself of the services of some or more of my

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family." It is not probable from his testimony that he understood the English language sufficiently well to have read Clark's will; and it appears pretty clearly from his testimony that what he knew of the contents or details of the will, he learned from Daniel Clark. This appears also from the following translation from his letter to Coxe, dated in 1819: "Unhappily, he (Clark) died and without their having been able to find the will, which he had very certainly made before his departure for Natchez, some time before his death, telling me that I was one of his executors, as well as Messrs. Relf, De la Croix and Pitot." And again, in the same letter he says: "She (Caroline) may have been mentioned in the will of which he spoke to me, and which disappeared God knows how." This visit to Natchez must have occurred upwards of a year before Clark's death, as will appear from his letter to Coxe, in which he speaks of challenging one Miur to fight a duel, and would correspond with the date, at which Mazureau says Clark talked with him about his will. It seems sufficiently proved that Bellechasse did not read the will, and this fact appears to be admitted by Mrs. Gaines in her bill in equity, filed in 1836.

"Your orator and oratrix further show unto this honorable court, and expressly charge, that the said will was wholly written and signed with the proper hand of the said Daniel Clark, and that the said will was shown by the said Clark to, and its contents read by the said Judge James Pitot, the late John Lynd, notary public in and for the parish and city of New Orleans, Mrs. Harriet Smith and others; and that the said will was shown also, and its contents communicated by the said Daniel Clark to the said Colonel Bellechasse, Chevalier de la Croix, Mr. Pierre Baron Boisfontaine and others."

Mrs. Harriet Harper (or Smythe) swears she read the will. It is urged, however, that a woman can not be a witness to establish a lost will; and article 1584 of the Civil Code, which declares that "women are absolutely incapable of being witnesses to testaments," is relied upon. That prohibition is to women attesting wills, as clearly appears from the French text of the article "*sont absolument incapables d'être témoins dans les testaments.*"

Mrs. Harriet Harper (or Smythe) is the only witness who read the will. Boisfontaine and Bellechasse, the other witnesses who speak of the contents of the will, derived their knowledge from the testator. We do not think this competent evidence to establish the contents of a lost will. It would practically authorize the making of verbal testaments, which is not recognized by our laws. Besides, if the declarations of the testator could be received to prove the contents and the verity of a lost olographic will, a lost testament could be proved by evidence, which would be incompetent to prove the will if produced in court.

In the succession of Eubanks, this court said: "The appellee contends that the testimony of witnesses, that Mrs. Eubanks (the testator) had told them said will was entirely written by her, satisfies the law. We think otherwise. Article 1648 of the Code is express, that the only proof admissible of olographic testaments, is the testimony of two witnesses, that they recognize the hand-writing as having often seen the testator write or sign during his lifetime."

We are of opinion that it is necessary to prove that the lost will contained all the essentials of an olographic will before it can be admitted to probate, to wit: That it was wholly written, dated and signed by the testator; and the witnesses must state the facts, which are necessary to enable the court to determine whether or not the will is valid. *Marcadé*, vol. 4, p. 11.

In this case two witnesses, Harper and Bellechasse, state that the will was wholly written, dated and signed by Clark. Bellechasse states it was dated in 1813; Harper says it was dated in July, 1813. Is this sufficient? Is a testament, which is dated A. D. 1813, or July A. D. 1813, to be deemed dated in the sense of the law? Certainly not, if the term dated is to be understood in its "common and usual signification." C. C. art. 14, 1946.

Webster defines the word date thus: "That addition to a writing which specifies the year, month and day when it was given or exercised." Bouvier *verbo* date. *Marcadé* says: "Dans l'usage, la date complète se constitue de l'indication du lieu, de l'année, du mois et du jour où l'acte s'est fait; mais l'indication du lieu ne saurait être exigée. En effet, les dates, dans le sens propre de ce mot, ne sont que les indications des temps, non celles des lieux; les mots date, dater, dans la loi comme partout ailleurs, n'expriment que l'idée de temps, d'époque; l'ordonnance de 1735, en exigeant pour les testaments olographes l'indication des jours, mois et an, ne demandait nullement l'indication du lieu, et il paraît évident que le Code a entendu la date comme l'entendait cette ordonnance. Tout le monde est d'accord sur ce point." Vol. 4, p. 7. Le principe nous paraît être que la date, qui est exigée par l'article 970, est celle du jour, du mois, et de l'année." *Demolombe*, vol. 21, p. 77. *Merlin verbo* Testaments, vol. 13, p. 595; *Serey Code Civil*, art. 970, p. 427.

It is essential, therefore, to specify the day, month and year to give a date to a testament, in the sense of article 1588 of the Civil Code. It is insisted, however, that the said witnesses state "that the will was dated"—that is true; but to hold that such a declaration in regard to a lost testament is sufficient would be to substitute the opinions or judgments of the witnesses for that of the court. If the will was dated, what was the date? The witnesses fail to inform us, except as above stated. There is not a jot or tittle of evidence to prove the will

was dated thirteenth July, and we are at a loss to imagine how that date happened to be given to the will, when it was probated in 1856. Again, these witnesses did not see the lost will at the same time, but out of the presence of each other; it can not be certain, therefore, that they testify in regard to the same will, as they have not stated the date of the will.

The witnesses do not state that they ever saw Clark write or sign his name—they do not even say that they were acquainted with his handwriting. From the intimacy between Clark and Bellechasse it is probable that he was familiar with his hand-writing, but it is not probable that Mrs. Harper was so. There is nothing in the record to suggest that she ever saw any of his writing, except the will, which he gave her to read, and which she saw but once. But we are not permitted to imagine what their knowledge was, when the law requires proof to be made of the fact. Article 1655 of the Civil Code provides that “the olographic testament shall be opened, if it be sealed; and it must be acknowledged and proved by the declaration of two credible persons, who must attest that they recognize the testament as being entirely written, dated and signed in the testator’s hand-writing, as having often seen him write and sign during his life time.”

The right to make a testament at all is derived from the law. The Legislature, which conferred the right, could undoubtedly impose such rules for the probate of wills as it deemed proper; and those rules or restrictions are obligatory upon courts. If we are at liberty to disregard one part of this article of the Code, we can disregard it entirely. And, instead of two witnesses, the court might be satisfied with one, or with no witness at all; substituting in lieu of witnesses, letters of the testator to enable the court to decide from a comparison of hand-writing; or, in case of the loss of the will, receiving the proved declarations of the deceased. That would be setting aside the provisions of article 1655 of the Code, and would certainly be legislation on the part of the court; and it is as certainly unauthorized, when there exists positive legislation on the subject, upon which the court is required to act. That the provisions of article 1655 are obligatory upon the courts, was held in the following cases: 9 An. 149, Succession of Eubanks; 18 An. 444, *Fox v. McDonogh’s succession*; 23 An. 117, *Sheppard will case*.

But, if the court were permitted to infer that Harper and Bellechasse had seen Clark often write and sign, still the evidence would fail to satisfy us that reliance could be placed in the testimony of Bellechasse. His letters written in 1814 and within a few years thereafter, can not be reconciled with his testimony given in 1834 and 1837. In his letter to Relf, dated twenty-third October, 1822, he writes:

“Je ne puis donc rien changer à ma déclaration, sans me parjurer te

ouvrir la porte à un procès que M^{lle} Mira aurait droit de me faire ; de plus, que puis-je vous dire dans un nouveau pouvoir ? Surtout ne m'ayant pas renvoyé le premier : je ne puis avoir exactement présentes les expressions de Clark ; je pourrais m'en écarter involontairement, ce que je n'ai pu faire à l'époque de mon acte déclaratoire, où elles se trouvaient encore gravées dans ma mémoire. Neanmoins, et relativement à M^{lle} Caroline, je puis dire, et même jurer, que Clark Clark avait une trop belle âme et le cœur trop bien placé pour avoir été capable, ayant deux enfans qu'il adorait, d'en avoir voulu favoriser une, en laissant l'autre exposée à mendier son pain et livrée aux vicissitudes qu'entraîne la misère. Je ne doute pas que si le testament de Clark ne s'était perdu, que l'on aurait vu que la partie de ces biens confiés au Chevalier de la Croix était désignée à M^{lle} Caroline, comme peut l'affirmer Mr. et M^{de}. Harper, qui assure que Clark leur en avait fait l'aveu," etc.

From this letter it is apparent that he did not know the contents of the will, for he expresses the belief that the lost will contained provisions which would have shown that the property confided to De la Croix by Clark was intended for Caroline. It shows also that Mrs. Harper had assured him that Clark had told her the same fact. If she had read the will why did she have to state what Clark had told her about it ? The letter shows that even at that date he himself could not trust to his memory in regard to the details of a trust confided to him ; yet, twelve years later he undertook to tell the details of the will of Clark. In this letter he says Clark had two children whom he adored, while in his testimony he swears that he "never heard said Daniel Clark speak of having any other child besides the said Myra." Again, in his letter to Daniel W. Coxe, he writes that Relf was one of the executors named in the will of 1813, and in his testimony he says he was not. He swears that Clark had lost confidence in Relf, while Boisfontaine, Cannon and others swear he had not, and all the written evidence in the record, bearing on the subject, goes to contradict him.

But it is not necessary to expose further the unreliability of his testimony ; nor to comment upon the testimony of Mrs. Harper in regard to the will, given nearly a quarter of a century after she had read the will. The laws of Louisiana does not allow a lost will to be established by the "dim recollections, imaginations or inventions of anile gossips," as, we trust, we have shown already. Here, as elsewhere, those propounding a lost testament must prove by competent evidence that the will was duly executed by the testator, and that it was in existence at the time of his death.

We have arrived at the following conclusions :

That the evidence does not rebut the presumption of law, that the

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will was destroyed by Clark himself, the will having been last seen in his possession.

That in establishing a lost will all the essentials of a will must be proved; and in this case one of the essentials, to wit, a date, has not been proved.

That two creditable persons, who have often seen the testator write and sign, are necessary to prove an olographic will; and the witnesses in this case are not shown to have had any knowledge of the handwriting of the testator.

It is therefore ordered, adjudged and decreed that the judgment of the court *a qua* be affirmed with costs of appeal.

HOWELL, J., *dissenting*. I am unable to concur in the opinion of the majority of the court on several important points in this case, two of which, I think, are fatal to plaintiffs' demand.

The action is one to revoke a will and recall the probate thereof as null, and I can find no interest in the plaintiffs sufficient to authorize them to bring suit in the probate court. They do not allege themselves to be heirs of the testator or (in direct terms) to have derived title to property from his estate through a forced heir or other person, and therefore they have no right of action.

But, if they have such interest as will maintain the action of nullity of a testament, they must be held liable to the law of Louisiana fixing the prescription of such actions. Their allegation that they can not contest the validity of the will in the Circuit Court of the United States, where they say they are sued by the defendant for certain lands, on account of the peculiar jurisdiction thereof, can not, in my opinion, change the rules of pleading, the relations of parties and the laws relating thereto and governing the rights of litigants, so as to maintain them in the attitude of defendants, using as a shield what in their suit they wield as a weapon of attack. If the defendant had a right to sue them in the United States Circuit Court, common justice would accord to them there all the defenses to which they are justly and legally entitled. But if it be true that they can not show in that court, as they allege, that the will or its probate is not valid as to them, it is their misfortune, for which the laws and the courts of Louisiana are not responsible, and we are not authorized, in my opinion, to bend the law to meet their case.

I think the action, if properly brought, is prescribed by five years under article 3542 (3507) of the Civil Code, and that the judgment of the lower court should be reversed and plaintiffs' suit be dismissed.

Rehearing refused.

Writ of error granted March 31, 1873, by Hon. Joseph Bradley, Associate Justice Supreme Court of the United States.

Pierce, Jr., v. Clark and Sheriff.

No. 4502.

J. O. PIERCE, JR., v. WM. CLARK and SHERIFF.

The title to property can not be attacked collaterally, and where a judgment creditor seizes property as belonging to his judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation.

The object of registry both of sales and mortgages is notice, and when the recorder registers a private sale, whether he has done so on sufficient proof is immaterial as regards notice to the public; the object of the law is fulfilled, and subsequent purchasers are affected. The failure of the recorder to inscribe with the instrument the proof upon which he admits it to registry does not render the registry null.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. Sparrow & Montgomery*, for plaintiff and appellant. *J. E. Leonard*, for defendants and appellees.

HOWELL, J. The plaintiff has enjoined the sale of an undivided half of the Oakland plantation, in Carroll parish, on the ground that he is the owner thereof by purchase in good faith and for a valuable consideration, with actual possession from the date of his purchase. He asked also for damages. The defendant, Clark, charged that the sale to plaintiff by his father, the debtor of deponent, is simulated and was entered into for the purpose of screening the property of the said debtor, who was then insolvent, from his creditors. He prayed for a dissolution of the injunction with damages. From a judgment in favor of defendant dissolving the injunction without damages the plaintiff has appealed.

It is the well settled jurisprudence of this court that the title to property can not be attacked collaterally, and that where a judgment creditor seizes property as belonging to his judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation. The counsel for defendant contends that simulation in this case is shown by the fact that the title of plaintiff is by act under private signature, which was not recorded according to law, so as to have effect against creditors and third persons, and was not attended by actual delivery. The act was recorded in due time, but the proof, taken at the time, by which it was admitted to registry was not recorded, nor was a certificate of the acknowledgment of the party recorded, which, it is contended, is essential under article 2253 R. C. C., which reads:

“The record of an act under private signature, purporting to be a sale or exchange of real property, shall not have effect against creditors or *bona fide* purchasers, unless, previous to its being recorded it was acknowledged by the party, or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgment be signed by the parish recorder, a notary or a justice of the peace, and recorded with the instrument.”

Pieroe, Jr., v. Clark and Sheriff.

The question is: Is the record of an act under private signature without any effect, if it does not contain the proof upon which the act was admitted to registry or record?

The object of registry, both of sales and mortgages, is notice; and when the recorder registers a private sale, whether he have done so on sufficient proof, is immaterial as regards notice to the public; the object of the law is fulfilled, and subsequent purchasers are affected. 9 An. 547; 10 An. 502; 5 An. 225; 6 An. 242; 2 An. 251; 21 An. 241. In 14 An. 701 it is said: "A private act once registered in the recorder's office becomes authentic, giving notice to creditors and third persons." And in 11 An. 533, where this question was directly presented, it is said: "It is the recording of the titles in the proper office which is notice to third parties, and not the testimony upon which the parish judge or recorder may have admitted the instrument to record."

From these rulings the doctrine is clearly deduced that the failure of the recorder to inscribe with the instrument the proof upon which he admits it to registry does not render the registry null.

There is satisfactory evidence that the purchaser obtained actual possession of the property as to his vendor at the time of the sale.

The motion to dismiss is not sustained, the matter in dispute being largely over \$500.

It is therefore ordered that the judgment appealed from be reversed, and that the injunction herein be perpetuated, with fifty dollars as attorney's fee and costs in both courts.

Rehearing refused.

No. 2705.

C. A. & L. L. CONRAD v. EDWARD W. BURBANK.

25 112
114 554
114 555

Where one of the joint owners of property claims from the other parties commissions for collecting rents and keeping the premises in repair, he must show an agreement on which to base his charge.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Conrad & Sons*, for plaintiffs and appellants. *Fellows & Mills*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

HOWELL, J. Plaintiffs sued defendant for a certain sum as rents of premises owned in common by the parties. Defendant admitted indebtedness of a part of the claim and set up payments, expenses and commissions as an offset to the balance. Judgment was rendered for the amount acknowledged (see 24 An. 17), and the contest now relates to the balance. The admission by plaintiffs of the account furnished by the defendant was conditional, and it devolves on the latter to establish its correctness.

C. A. & L. L. Conrad v. Burbank

Claiming to be a joint owner of the property, he must show an agreement to charge commissions for recovering rents and keeping the premises in repair. This he has not done. Nor can he charge plaintiffs with the premiums on insurance, as it is shown that the insurance covered only his own interest. The items then of his account for commissions and premiums must be rejected.

Of other disbursements the only proof in the record is of the following, to wit: Haller's bill \$57 75; Craft's bill \$32 70; J. G. Lewis' bill \$115; City taxes \$225; State taxes (two items) \$94 75, making a total of \$525 20 established by evidence.

The aggregate amount of collections was \$4362 97; deduct from this the above sum, leaves \$3837 77 to be divided. Plaintiffs' half is \$1918 88; of this they received \$1355 61 under the former decree, which leaves \$563 27 still due them by defendant.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiffs recover of defendant the sum of \$563 27 with legal interest from judicial demand, and costs in both courts.

Rehearing refused.

No. 4490.

JOHN I. ADAMS v. ASA WEBSTER.

A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws."

This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned.

Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties.

A PPEAL from the Fifteenth District Court, parish of Lafourche. *Beattie, J.* Trial by jury. *Goode & Bush*, for plaintiff and appellant. *Jourdan*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

HOWELL, J. This is a suit on two promissory notes made by defendant, Webster, to the order of and indorsed by one J. F. Thompson, and secured by mortgage on certain property in the town of Thibodaux, sold by Thompson to Webster on the twentieth of November, 1865. The defense is that said notes are the property of defendant; that Thompson and the plaintiff were commercial partners from 1864 till recently; that at, before and after the maturity of said notes, Thompson had in his hands money and proceeds of cotton,

amounting to \$5440 of defendant's, deposited from October 6, 1865, to the institution of this suit, as per account annexed, which he refuses to pay; that Thompson having these notes in his hands should have canceled them as the most onerous debt; that Thompson held the said notes and the said deposit as partner or agent of plaintiff; that if they were transferred to Adams, it was long after their maturity and they are subject to equities. He pleads compensation and prays judgment in reconvention for the cancellation of the notes and for the difference between the amount of the said notes and the deposit, and propounds interrogatories on facts and articles to plaintiff.

The case was tried before a jury, and the plaintiff having introduced in evidence his own answers to interrogatories, the two notes, the act of sale from Thompson to Webster, the defendant; the answer, amended answer and exception of defendant; his affidavit for a jury and his demands in compensation and reconvention, a verdict was rendered in favor of defendant and judgment accordingly given thereon. Plaintiff made a motion for a new trial, in which he suggested that as juries are composed under existing laws he could not "expect any change as to the future verdict of any jury which may be impaneled hereafter to try the case;" upon which the judge *a quo* remarked, "the motion for a new trial would undoubtedly be granted, but the court has refused the new trial with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties to additional and unnecessary expense by submitting the case to another jury, which would be composed as the one which tried the case under existing laws."

We can not sanction this mode of proceeding or the above stricture on the laws relative to juries and the censure in advance of a jury to which the case might be submitted. When the judge in the lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial, and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it reversed on appeal. It might be that the verdict on a second trial would prove to be satisfactory to both parties. In this case the application for a new trial should have been granted, and the case for this reason must be remanded. An examination into the record convinces us also that the ends of justice will be subserved by remanding it.

It is therefore ordered that the judgment and verdict herein be set aside and reversed, and that this case be remanded to the lower court to be proceeded in according to law, costs of appeal to be paid by appellee.

Rehearing refused.

State v. Branch.

No. 4438.

THE STATE v. JAMES BRANCH.

Where a motion as to the disqualifications of a grand juror, which rested on questions of facts, was overruled, and no bill of exceptions taken;

Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes.

Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where, on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto;

Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary.

A PPEAL from the Fourteenth District Court, parish of Ouachita. *Hay, J.* Criminal case. District Attorney, for the State. *Richardson & McEnery*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

HOWELL, J. The defendant, having been found guilty of shooting with the intent to commit murder, has appealed from a judgment sentencing him to imprisonment at hard labor in the State Penitentiary for the term of five years.

After verdict, a motion for a new trial was made, on the ground that the verdict was contrary to the law and the evidence, and afterwards, an amended motion, supported by defendant's affidavit, was made on the ground that "William Hamilton, one of the grand jurors, who constituted the grand jury which found and presented the indictment in this case against the defendant was not a duly qualified elector of the State of Louisiana at the time he was selected, impaneled, sworn and charged as a grand juror; that the said Hamilton was not twenty-one years of age at the date of his pretended registry, but a minor and was not a competent juror."

These motions were overruled, but no bill of exceptions was taken, and hence we can not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes.

Before sentence was passed the defendant filed a motion in arrest of judgment on the ground "that the name of A. F. Flournoy, foreman of the grand jury, was drawn from the box with the other grand jurors, and not selected as required by law, and the drawing of the jury was therefore illegal, as shown by the minutes of the court."

From the bill of exceptions taken to the ruling of the judge on this motion, it appears that on the trial thereof the district attorney moved the court to correct the minutes of the court so as to show that the said "A. F. Flournoy was appointed foreman of the grand jury, whereupon the following fifteen grand jurors were drawn, and together with their foreman impaneled, sworn and charged by the court as the grand jury for this term." It was objected that this cor-

rection could not be made after the trial and without evidence. We think the judge did not err. The minutes can at any time be corrected, as was done, to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary.

Judgment affirmed.

No. 4552.

SUCCESSION OF JOHN HEITZLER—M. FRANK in opposition.

Where it was alleged, in opposition to the claim of a necessitous widow, that the adjudication of a debtor's property to himself, created the vendor's privilege to secure the twelve months bond which he gave;

Held —That an adjudication of this character does not create the vendor's privilege, because it does not transfer the ownership of the property, nor change the nature of the title and possession; that it neither satisfies the judgment, nor novates the debt; that it is not strictly a sale, but only a means by which a creditor acquires additional security for his debt.

A PPEAL from the Parish Court, parish of East Feliciana. *Pipkin, J. D. J. Wedge*, for administrator and appellant. *D. C. Hardee*, for M. Frank, opposer and appellee.

Justices concurring: *Ludeling, Taliaferro, Wyly.*

WYLY, J. Michael Frank opposed the final account of the administrator of the succession of John Heitzler, on the ground that his claim of \$435 is a mortgage and vendor's privilege debt, and should be paid out of the funds to be distributed in preference to the claim for \$1000 set up by the necessitous widow of the deceased, the funds being insufficient to pay all the debts.

The court maintained the opposition; the administrator and the surviving widow have appealed.

It appears that the debt due to Frank is evidenced by a twelve months bond given by John Heitzler at the sale of his own property by a judgment creditor.

The question is, does the adjudication of a debtor's property to himself create the vendor's privilege to secure the twelve months bond which he gives. If the claim of the opponent be secured by the vendor's privilege, the court did not err in allowing it to be paid by preference over that of the necessitous widow. We think an adjudication of this character does not create the vendor's privilege, because it does not transfer the ownership of the property, nor change the character of the title and possession. It neither satisfies the judgment nor novates the debt; it is not strictly a sale, but only a means by which a creditor acquires additional security for his debt. 12 R. 206; 2 M. 178, 328, 331; 7 N. S. 221; 9 La. 92; 8 R. 180; 10 R. 154; 2 An. 239; 3 An. 381; 11 An. 184.

Succession of Heitzler.

As there was no sale there was no vendor's privilege. The court therefore erred in allowing the claim of the opponent in preference to that of the necessitous widow. Revised Statutes of 1870, section 1693.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the claim of one thousand dollars set up by the necessitous widow be allowed as a preference claim; that the claim of the opponent be placed on the final account as an ordinary debt, and that the account as thus amended be homologated and become the judgment of the court.

It is further ordered that appellee pay costs of appeal.

No. 4501.JOHN I. ADAMS *v.* ASA WEBSTER.

Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation;

Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it.

A PPEAL from the Fifteenth District Court, parish of Lafourche. *Beattie, J.* Trial by jury. *R. D. Jourdan*, for defendant and appellant. *Bush & Goode*, for plaintiff and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

HOWELL, J. The plaintiff, as assignee of one J. F. Thompson, sues the defendant on an open account, and the only question now before us, as stated by plaintiff's counsel is, should or not the evidence, offered by defendant to prove his claim in compensation and reconvention be admitted?

We think it should. Thompson could transfer to Adams only such rights as he possessed, and if it be true, as alleged by the defendant, that he had deposited with Thompson a large sum of money before the transfer to Adams, which has not been accounted for, the defendant did not owe Thompson the amount set out in the account sued on. In other words, compensation took place, and the defendant should, under the pleadings, have the opportunity to show it.

It is therefore ordered that the judgment appealed from be reversed, and that this cause be remanded to the lower court with instructions to the judge thereof to admit evidence to establish the plea of compensation, and to be proceeded in according to law. Appellee to pay costs of appeal.

Rehearing refused.

Locke, Tutrix, v. Barrow.

No. 4487.

E. LOCKE, Tutrix v. ROBERT R. BARROW.

A judgment of nonsuit based upon the mere failure of a plaintiff to appear, can not be regarded as a voluntary abandonment of the claim. The suit was sufficient to interrupt prescription.

Where it might be true that, technically, a widow had never qualified as administratrix of her husband's succession, yet where she qualified as tutrix to her minor children, she necessarily became administratrix of his succession, and payment to her as such of a debt due to the succession would be valid.

A PPEAL from the Fifteenth District Court, parish of Terrebonne. *Louis West*, Acting Judge. *Tobias Gibson, Breaux, Fenner & Hall*, for plaintiff and appellant. *F. S. Goode*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

MORGAN, J. Plaintiff seeks to recover from the defendant the amount of two promissory notes drawn by him to the order of Samuel Locke, dated March 17, 1865, payable twelve months after date, one for \$553 27, and one for \$634 38, upon which plaintiff acknowledges the receipt of \$50. Citation was served on the nineteenth April, 1872. The defense is prescription.

Plaintiff contends that prescription has been interrupted.

Samuel Locke died in July, 1865. Soon afterwards, Mrs. Locke presented a petition to the Second District Court of New Orleans, representing that there were no debts due by the estate, and praying that as natural tutrix and usufructuary, she might be put in possession of his property, which was granted. It is not denied that the notes sued on formed a part of the property of the succession.

In 1867 she instituted suit on the notes in question, in the name of Mrs. Emilina Guesdon, widow of Samuel Locke, and administratrix of his succession. The answer denied that she was the duly qualified administratrix of her deceased husband's estate. Upon these pleadings the case rested until the eighth November, 1871, when being assigned for trial, and the plaintiff and her counsel being absent and having been called at the courthouse door, and not answering, judgment of nonsuit was entered against her.

The defendant claims;

I. That not having appeared when called on, the day the case was fixed for trial, she must be held to have abandoned the suit; and

II. That she sued in a capacity which she did not possess, and that the suit did not interrupt prescription.

First—Voluntary abandonment does put an end to a suit, and a judgment rendered against a plaintiff on this ground puts an end to the pretensions which he set up; he can never be heard upon them again. But this abandonment must be express or positively implied; for instance, when he declares that he voluntarily abandons his pursuit; or by some other voluntary act showing a clear intention to do

 Locke, Tutrix, v. Barrow.

so. We can not regard a judgment of nonsuit based upon the mere failure of a plaintiff to appear as a voluntary abandonment of his claim. Upon this point we give our adhesion to the doctrine laid down in 3 La. 282; 11 R. 250; 7 An. 523; 8 An. 453, 469; 10 An. 331.

Second—The suit instituted by Mrs. Locke was sufficient to interrupt prescription. It may be true that, technically, she never qualified as administratrix of her husband's succession, but when she qualified as tutrix to her minor children, she necessarily became administratrix of his succession. Payment to her would have discharged the debt, and this is the only interest which the defendant had in the matter.

It is therefore ordered, adjudged and decreed, that judgment of the district court be avoided and reversed, and that there be judgment in favor of the plaintiff and against the defendant for the sum of eleven hundred and thirty-seven dollars and sixty-five cents, with eight per cent. interest from the seventeenth March, 1865, until paid, appellee to pay the costs of appeal

 No. 4088.

STATE OF LOUISIANA ex rel. ATTORNEY GENERAL and al. v. TIMOTHY DOHERTY.

The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government.

The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J.* Trial by jury. *Hornor & Benedict* and *W. W. Howe, S. Belden*, Attorney General, and *A. A. Atocha*, for plaintiff and relator. *Hays & New* and *T. & J. Ellis*, for defendant and appellee.

Justices concurring: Ludeling, Wyly and Morgan.

WYLY, J. The Attorney General, on the information of Joseph L. Tharp, brings this suit in the name of the State, under the intrusion act, against the defendant for the office of tax collector of the Sixth District of the city of New Orleans, praying that said Tharp be decreed entitled thereto, and that the defendant be restrained by injunction from administering said office, and that he be condemned to deliver to the relator certain books and other property belonging to the State and appertaining to said office.

The defendant pleaded the general issue, and averred that he is the sole and lawful tax collector for said district, having been duly commissioned, qualified and inducted into said office according to law.

The case was tried by a jury and the result was a judgment on their verdict in favor of the defendant. The plaintiffs appeal.

State ex rel. Attorney General and al. v. Doherty.

It appears that the defendant was appointed tax collector for the Sixth District of the city of New Orleans on the fifth of March, 1872; and the relator was appointed to said office on the eighth June, 1872, the commission of the latter reciting that he was appointed "*vice* T. Doherty removed."

The question is, had the Governor authority to remove the defendant and appoint the relator?

Section 1593 of the Revised Statutes of 1870 declares that "any assessor or member of the board of assessors, or tax collector of the city of New Orleans, or any State collector, refusing or failing to do his duty, as prescribed by this act, shall be liable to dismissal from office by the Governor."

When the Governor removed the defendant and appointed the relator he decided that the defendant had failed or refused to do his duty, because it was in this contingency only that he had the right to remove him. However erroneous the decision of the Governor as to that question may be, we do not think it can, under our system of government, be examined by the courts.

The Legislature created the office; and the law provided that the Governor might make the appointment, and for a certain cause remove the officer appointed by him.

Here the law invested the Governor with a discretionary power, which could alone be employed by him. The decision of all the courts of the State could not compel him to make the removal.

The removal of the defendant for neglect of duty was the exercise of Executive discretion. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause.

The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government.

"The powers of the three departments are not merely equal, they are exclusive in respect to the duties assigned to each." *Wright v. Defrees*, 8 Ind. 302.

"The policy of our constitution and laws has assigned to the different departments of the State government distinct and different duties, in the performance of which it is intended that they shall be entirely independent of each other, so that whatever power or duty is expressly given to or imposed upon the Executive department is altogether free from the other branches of the government." *Attorney General v. Brown*, 1 Wisconsin 522.

To institute the inquiry as to the correctness of the cause for which the Governor removed the defendant would be a direct attack upon the independence of the Executive, "and a usurpation of power subversive of the constitution." See *Cooley's Constitutional Limitations*, 187, and authorities there cited.

State ex rel. Attorney General and al. v. Doherty.

The defendant contends, however, that the Governor had no authority to remove him under section 1593 of the Revised Statutes of 1870; because by section 92 of act No. 42 of the statutes of 1871 the Auditor of Public Accounts, upon evidence of embezzlement, breach of trust or fraud, is required to "cause the arrest of such collector," whose official functions shall thereupon be suspended, and "the Governor immediately on such arrest, shall proceed to appoint some competent and trustworthy person." * * * * *

The repealing clause of this statute only repeals all laws "contrary to or inconsistent" therewith.

The statute of 1871, creating the additional remedy for embezzlement, breach of trust or fraud on the part of the collector, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former.

The case of *Downes v. Towne*, 21 An. 490, cited by the defendant, is no authority in his behalf; because Downes held a constitutional office, of which he could not be deprived according to the constitution, except by address or impeachment.

It is therefore ordered that the judgment appealed from be annulled; and it is decreed that there be judgment for the plaintiff, condemning the defendant to restore to the relator all the books and other property appertaining to the office of tax collector of the Sixth District of the city of New Orleans, and also restraining him from exercising or attempting to exercise the duties of said office, and decreeing that the relator is entitled to administer said office. It is further ordered that the defendant pay costs of both courts.

Rehearing refused.

No. 2765.

EUREKA INSURANCE COMPANY v. J. W. TOBIN and GEORGE A. WILLIAMS.

Where the suit was on promissory notes given as premiums on policies of insurance to a company, and the plea in defense a want of consideration, on the ground that the policies, if issued, were not in accordance with the instructions from the party intending to be insured to the agents of said company, and did not cover the risks stipulated in the application; and where the issue was that the policies never were issued and delivered to the applicant, the proofs, which should be in the possession of the plaintiff, not being found in the record, there will be a judgment of nonsuit.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard*, J. *William Grant*, for plaintiff and appellant. *R. H. Marr*, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

MORGAN, J. Tobin, one of the defendants, is, or was on the twentieth February, 1868, owner of the Frank Pargoud. Williams, the other defendant, was his clerk.

Tyler & Co., residing at Louisville, Ky., are, or were at the time above designated, insurance agents for some Pittsburg companies.

Tobin, being about to leave Louisville with his steamer, made application to Tyler & Co. to effect insurance on his boat for \$100,000. Tobin sailed from Louisville on his steamer, bound for New Orleans, before the insurance was effected and pending negotiations therefor. When at Memphis he received a letter from Tyler & Co., saying that the insurance could be had, and requesting him to forward his notes for the premium agreed upon, which he did. The notes are all dated Pittsburg, Pa., February 20, 1868, although they were sent either from Memphis or New Orleans, payable to the order of Geo. A. Williams, the other defendant herein, at the office of James Tyler & Co., Louisville.

The object of this suit is to recover on some of these notes.

It is in proof that the notes sued on were given in payment of premiums on the policies which were to have been obtained by Tyler & Co. Some of them appear to have been given by Tyler & Co. directly to the Eureka company, while others of them were given to the Citizens' Insurance Company and the Boatmen's Fire Insurance Company. They are all sued upon, however, as being owned by the Eureka company, and their title is not specially denied.

Tobin's defense is want of consideration in this: that Tyler & Co. did not comply with the instructions he had given them with reference to the risks which he desired to be insured against. That at the time he applied to Tyler & Co. to effect the insurance on his boat they exhibited to him certain policies issued by the Eureka company, containing certain terms and stipulations to which he was not willing to assent, and to which he never did assent, and that they promised to obtain a policy which would accord with his wishes, which they never did. And he denies that he ever received the policies which should have been issued to him.

Williams says that he was merely the clerk of Tobin, and that he is without interest in the suit. Further he adopts Tobin's answer.

Tyler & Co. were the agents of the insurance companies in effecting the insurance on the Pargoud; they were their agents in contracting for the insurance; in receiving the policies and in receiving the premiums—the notes given therefor being payable at Tyler & Co.'s office. It was to the Pittsburg offices that Tyler & Co. looked for their brokerage, and it was to them, through his associate, Madeira, that it seems to have been paid. Unless, therefore, the policies were issued in accordance with Tobin's instructions and to cover the risks which he desired to be insured against, he is not bound. The issue that the policies were never issued and delivered to him, was expressly tendered by the answer, and the proof, which should be in the possession of the plaintiff, is not to be found in the record.

Enreka Insurance Company v. Tobin and Williams.

The secretary of plaintiffs' company swears that the policies were issued to Tyler & Co., through Madeira, his associate, at Pittsburg; and Tyler & Co. acknowledge the receipt of a letter from Madeira "conveying policies steamer Frank Pargoud as stated," but from what companies these policies issued, or what risks they covered, he does not say. Neither have the plaintiffs produced a copy of the policies issued upon the faith of the premiums. These copies must certainly have been in their possession or under their control.

E. D. Tyler, who seems to have conducted the negotiation for Tyler & Co., swears that he sent the policies to Tobin from Louisville "by mail or perhaps by express," and that his recollection is that Tobin acknowledged their receipt, but the letter of acknowledgment, which should have been in his possession, is not produced.


Now Tobin swears that in the letter which he received at Memphis, and which has already been referred to, Tyler & Co. wrote him that part of the policies had been received; that they were not in accordance with the understanding between Tyler & Co. and himself, and that they had been returned to the office to be changed; that some time after he received a package from Tyler & Co. containing policies of insurance; that the package was given to Williams, clerk of the boat, and put away in an iron safe; that the package containing the policies remained in the safe for some months before he examined them; that he then went carefully over them with Williams, and found that the policies from the three offices to which the notes sued on in this case were given were not in the package, and had never been in his possession; and that Williams, who did all his correspondence, wrote to Tyler informing him of the fact, and that he received no answer. Williams swears to the same facts.

This evidence is entirely uncontradicted.

It was in the power of plaintiff to show the instructions under which Tyler & Co. were authorized to obtain Tobin's insurance; it was in their power to show not only that the policies had issued, but that they covered the risks the defendant wished to insure against, and they should have shown, if the fact existed, that Tyler & Co., who were their agents, not only received the policies, but that they forwarded them to the defendant, and that he acknowledged the receipt thereof, or have proved that they came into his possession. In our opinion the plaintiffs have not made out their case.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendants, as in case of nonsuit, plaintiffs and appellees to pay the costs.

Rehearing refused.



Leonie Lepretre v. Barthet.

No. 2870.

LEONIE LEPRETRE v. ALEXANDER BARTHET.

The objection that, when the release bond in this case was signed on the first of July, 1868, there was no law authorizing the release on bond of property provisionally seized, is not well taken. It was authorized by the act of the sixth July, 1867. See Revised Statutes of 1870, section 1914.

As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety.

Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond, or release the surety.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Alfred Grima*, for plaintiff and appellee. *G. Schmidt*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

WYLY, J. The plaintiff had judgment in the Third District Court, on second of July, 1868, against Louise Nicholas, for \$438 50, recognizing his lessor's privilege on the movables provisionally seized. Before said judgment was signed, however, the said Louise died. The suit was transferred to the Second District Court, and there the judgment was signed contradictorily with curator of the deceased.

The plaintiff then brought this suit against the defendant, the surety on the bond to release the property provisionally seized in said suit. After a general denial, the answer admits the signing of the bond, but denies the indebtedness of the party whose property was provisionally seized; and avers that on the death of the said Louise Nicholas all the furniture which had been provisionally seized remained in her possession, was duly inventoried and delivered to the curator of her succession, and by virtue thereof "the aforesaid bond by him given was discharged and annulled."

The court gave judgment for plaintiff for \$438 50, and the defendant appealed. The objection set up in the brief that when the release bond was signed on first July, 1868, there was no law to authorize the release on bond of property provisionally seized, is not well taken. It was authorized by the act of sixth July, 1867. See Revised Statutes of 1870, section 1914.

As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce payment against the principal debtor. R. C. 3066.

But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety. *Alley v. Hawthorn*, 1 An. 122; *Trimble v. Birchta*, 11 An. 271; *Murison v. Butler*, 20 An. 513.

Leonie Lepretre v. Barthet.

The plaintiff, therefore, not being able to issue execution against the succession of Louise Nicholas, had the right to proceed against the defendant, her judicial surety, to make him liable on the bond given for the release of the furniture provisionally seized.

The condition of the bond was, "that if the said defendant shall satisfy such judgment as may be rendered against her, in the suit pending as above mentioned, then this obligation to be void, or else to remain in full force."

Now, after the release bond was given, the plaintiff prosecuted his suit to final judgment against the said Louise Nicholas for \$438 50, and it has not been paid. There may have been irregularities in the proceeding in which said judgment was rendered; but on the merits the judgment is sustained by the proof.

The fact that the property provisionally seized remained in the hands of the debtor after the release bond was given, did not discharge the bond or release the surety. That was not the condition of the bond. It was that the debtor shall pay "such judgment as may be rendered against her."

That Louise Nicholas died after judgment, but before it was signed, and that it was transferred to the Second District Court and there signed contradictorily with the curator of the deceased, shows nothing to invalidate the judgment. It was the proper mode to pursue. We see no error in the judgment appealed from.

Judgment affirmed.

No. 4533.

SUCCESSION OF MERADAY NEAL—Opposition to final account by the
HEIRS OF FRANKLIN.

Where the creditors of a succession opposed the final account of the administratrix of said succession on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid;

Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiae*.

The administratrix should not have omitted to place the claim of the opponents on her final account and to provide for its payment, because the process of garnishment had been resorted to against one of the opponents by a third party.

APPEAL from the Parish Court, of the parish of Rapides. *Daigre*,
J. T. C. Manning, for administratrix. *Wm. A. Seay*, for opponents.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The heirs of Franklin, judgment creditors of the succession of Meraday Neal, opposed the final account of the administratrix of said succession because their claim for several thousand dollars was

Leonie Lepretre v. Barthet.

No. 2870.

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As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety.

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Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

WYLY, J. The plaintiff had judgment in the Third District Court, on second of July, 1868, against Louise Nicholas, for \$438 50, recognizing his lessor's privilege on the movables provisionally seized. Before said judgment was signed, however, the said Louise died. The suit was transferred to the Second District Court, and there the judgment was signed contradictorily with curator of the deceased.

The plaintiff then brought this suit against the defendant, the surety on the bond to release the property provisionally seized in said suit. After a general denial, the answer admits the signing of the bond, but denies the indebtedness of the party whose property was provisionally seized; and avers that on the death of the said Louise Nicholas all the furniture which had been provisionally seized remained in her possession, was duly inventoried and delivered to the curator of her succession, and by virtue thereof "the aforesaid bond by him given was discharged and annulled."

The court gave judgment for plaintiff for \$438 50, and the defendant appealed. The objection set up in the brief that when the release bond was signed on first July, 1868, there was no law to authorize the release on bond of property provisionally seized, is not well taken. It was authorized by the act of sixth July, 1867. See Revised Statutes of 1870, section 1914.

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 Leonie Lepretre v. Barthet.

The plaintiff, therefore, not being able to issue execution against the succession of Louise Nicholas, had the right to proceed against the defendant, her judicial surety, to make him liable on the bond given for the release of the furniture provisionally seized.

The condition of the bond was, "that if the said defendant shall satisfy such judgment as may be rendered against her, in the suit pending as above mentioned, then this obligation to be void, or else to remain in full force."

Now, after the release bond was given, the plaintiff prosecuted his suit to final judgment against the said Louise Nicholas for \$438 50, and it has not been paid. There may have been irregularities in the proceeding in which said judgment was rendered; but on the merits the judgment is sustained by the proof.

The fact that the property provisionally seized remained in the hands of the debtor after the release bond was given, did not discharge the bond or release the surety. That was not the condition of the bond. It was that the debtor shall pay "such judgment as may be rendered against her."

That Louise Nicholas died after judgment, but before it was signed, and that it was transferred to the Second District Court and there signed contradictorily with the curator of the deceased, shows nothing to invalidate the judgment. It was the proper mode to pursue. We see no error in the judgment appealed from.

Judgment affirmed.

No. 4533.

SUCCESSION OF MERADAY NEAL—Opposition to final account by the HEIRS OF FRANKLIN.

Where the creditors of a succession opposed the final account of the administratrix of said succession on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid;

Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiae*.

The administratrix should not have omitted to place the claim of the opponents on her final account and to provide for its payment, because the process of garnishment had been resorted to against one of the opponents by a third party.

APPEAL from the Parish Court, of the parish of Rapides. *Daigre, J. T. C. Manning*, for administratrix. *Wm. A. Seay*, for opponents.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The heirs of Franklin, judgment creditors of the succession of Meraday Neal, opposed the final account of the administratrix of said succession because their claim for several thousand dollars was

not placed on said account and paid. They opposed every item of said account, and prayed that it be not homologated until their claim be placed in the account and paid according to law. They also prayed for a rule requiring the administratrix to sell property and pay their judgment.

The answer states:

First—That the balance due on the judgment in favor of the opponents is only \$2500, as will appear from a receipt on the judgment itself.

Second—A considerable part of the balance has been garnisheed in respondent's hands by a creditor of one of the opponents.

Third—That the original judgment was on a note signed by her as administratrix, and she was unable to bind the estate thereby.

Further answering, she alleges that the debt or claim held by the opponents was partly prescribed when she gave the note upon which they obtained judgment subsequently. The court maintained the opposition and made the rule absolute.

It appears that the balance due the opponents on their judgment is only \$2800, with eight per cent. per annum interest thereon from the first of January, 1870, and it was so stated in the reasons for judgment; but the judge, doubtless through inadvertence, made the rule absolute for the full amount of the judgment. This error must be corrected.

The administratrix can not in the parish court attack collaterally the final judgment of the district court against her in behalf of the opponents, for two reasons:

First—Because a judgment not absolutely void can not be attacked collaterally.

Second—Because the parish court can not revise a judgment of the district court. Also, because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiæ*.

The administratrix should not omit to place the claim of the opponents on the account and to provide for its payment, because the process of garnishment has been resorted to against one of the opponents by a third party.

We think the court did not err in declining to homologate the final account and discharge the administratrix until the amount due on the judgment of the opponents be paid.

It is therefore ordered that the judgment herein be amended by limiting the amount due the opponents to twenty-eight hundred dollars, with eight per cent. per annum interest thereon from first day of January, 1870, and as thus amended let the judgment be affirmed. It is further ordered that appellees pay costs of appeal.

Rehearing refused.

Hughes v. Pipkin.

No. 4510.

M. W. HUGHES v. L. M. PIPKIN.

The fifty-fourth section of the act of 1870, No. 100, relating to elections, repeals section 1430 of the Revised Statutes, being section No. 53 of the act of March 15, 1855, prescribing the mode of contesting elections, and the party commissioned under the provisions of said act of 1870 is *prima facie* entitled to the office he claims.

APPEAL from the Fifth District Court, parish of East Feliciana. *Posey, J. Wickliffe & Adams*, for plaintiff and appellant. *McVea, Kernan, Lyons & Wedge*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell and Morgan.

TALIAFERRO, J. The facts of the case seem to be that Hughes and Kilbourne were opposing candidates for the office of Parish Judge of East Feliciana, at the general election held in November, 1872. Hughes being returned as elected, Kilbourne on the twelfth day of November brought an action in the district court under the act of 1855, claiming that he was legally elected, and contested the election as between himself and his competitor, setting up various grounds of illegality and irregularity in the manner of conducting the election. Pending this contestation, Hughes filed a rule in the same court on the twentieth of January, 1873, on the defendant, Pipkin, to compel him to vacate the office and give possession of it to the claimant who was commissioned on the seventeenth of December, 1872, by P. B. S. Pinchback, then acting Governor of the State. Pipkin answered, setting up various exceptions to the plaintiff's pretensions, and averring that he was holding over until the installment of his successor and that he was not otherwise interested than in discharge of his duty to hold the office until the party legally declared entitled to the office presented himself. He plead in defense of his possession all the defenses set up by Kilbourne in his petition of intervention which was rejected by the court. All the issues between the plaintiff and Kilbourne are presented in this case between the plaintiff and the defendant. It is unnecessary to determine all the exceptions presented by the bills found in the record. That which relates to the plaintiff's commission, on the ground that it was issued in less than fifty days from the general election in pursuance of which it was issued, and on the ground that the commission was issued by an incompetent person, who is only a private citizen, and without authority as Governor of the State, was properly overruled by the court.

The rule taken by the plaintiff was discharged. The plaintiff thereupon took this appeal.

The only question presented is, does the fifty-fourth section of the act of 1870, No. 100, relating to elections repeal section 1430 of the Revised Statutes? The section 1430 of the Revised Statutes, being section No. 53 of the act of March 15, 1855, prescribing the mode of

Hughes v. Pipkin.

contesting elections, provides: "That the Governor shall not issue a commission until forty days after the day of the election for the parishes within one hundred and fifty miles from the seat of government, and fifty days for those parishes over one hundred and fifty miles from the seat of government. The distance to be computed by the usually traveled route."

The last clause of the fifty-fourth section of the act of 1870, provides that, "the Governor shall within thirty days thereafter issue commissions to all officers thus declared elected, who are required by law to be commissioned." By the act of 1870, as well as by the act of 1872, the Governor is required to issue the commissions within thirty days from the publishing in the official journal the returns of the election. By the act of 1855 the Legislature prohibits the Governor from issuing commissions sooner than forty days, in one case, and fifty days in another case. These two acts clearly conflict in one particular on the same subject matter, and that is, in regard to the time to be observed by the Governor in the issuing of commissions. Here is a point of direct collision. We can not give effect to both enactments. We are, however, relieved from the dilemma by the last section of the act of 1870, which provides "that all laws or parts of laws contrary to the provisions of this act, and all laws relating to the same subject matter are hereby repealed, and that this act take effect from and after its passage."

The plaintiff was duly commissioned under the provisions of the last act, and *prima facie* is entitled to the office in controversy.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed. It is ordered that the rule be made absolute; and that the defendant, L. M. Pipkin, vacate the office of Parish Judge of the parish of East Feliciana, and cease to discharge the duties thereof, and that he deliver the said office with all the papers, records and archives appertaining thereto to the plaintiff, the defendant and appellant paying costs in both courts. This decree is in no manner to prejudice the rights of the contestant, Kilbourne, in any proceedings he may have instituted, or may hereafter institute according to law in support of any claim or right he may have to the said office.

WYLY, J., *dissenting*. This being a proceeding by rule, under act approved fifteenth January, 1873, to obtain possession of the office of parish judge of the parish of East Feliciana, I think the action should fail, because said statute is unconstitutional and void. My reasons for this conclusion I had occasion to express in the case of *Morgan v. Kennard*, lately decided, and I now refer to my dissenting opinion in that case in support of the position I take in this case.

But leaving out of view the objection to the form of the proceeding, I think on the merits the case is with the defendant.

The defendant contends that the commission issued to the plaintiff and upon which, as *prima facie* proof, he seeks to get possession of the office occupied by him, is utterly null and void, and was not contemplated by the statute under which the rule herein was taken, because said commission was issued contrary to a prohibitory law.

Kilbourne and Hughes were opponents at the election held on the fourth day of November, 1872, for the office of parish judge; and pursuant to the provisions of the Revised Statutes of 1870 on the subject of contested elections, Kilbourne instituted a regular contested election suit against Hughes, and notified the Governor thereof, that no commission might issue pending the controversy. Notwithstanding which and notwithstanding the prohibition of section 1430 of said Revised Statutes, the Governor issued a commission to the said Hughes.

The defendant, the incumbent, holding over under article 122 of the constitution, has the right to resist the pretensions of the plaintiff, if the commission, which he presents as his *prima facie* right to the office, was issued contrary to a prohibitory law, because what is done in contravention of a prohibitory law is an absolute nullity.

The law on the subject of "contested elections," section 1421 Revised Statutes, provides that: "Within ten days after the election, the party contesting shall present to the court, and which shall be filed, a petition, signed by at least twenty of the voters of the parish, * * * praying the court to examine the facts and decide thereon."

Section 1422: "After ten days from the date of service of the petition of the contestant, * * * the adverse party shall be bound to answer, and the issue thus formed shall be proceeded with summarily before the court and jury. The trial shall be conducted and submitted to the jury according to the laws by which other jury trials are governed. * * * The jury shall have power to determine by their verdict which of the parties is entitled to the office, or to refer the same again to the people. The court shall have no power to grant a new trial as in other cases, and no appeal shall be allowed."

Section 1423 provides that: "The judgment rendered upon the first finding of the jury shall be final; and on certifying the same to the Governor a commission shall be issued by him in favor of the person in whose favor the verdict may be."

Section 1424 declares that: "If the finding of the jury be in favor of a new election, the sheriff or coroner may proceed to hold an election, etc., etc."

Section 1430 provides that: "The Governor shall not issue a commission until forty days after the day of election, for the parishes within one hundred and fifty miles from the seat of government, and

fifty days for those parishes over one hundred and fifty miles from the seat of government. The distance to be computed by the usual traveled route. On the successful candidate furnishing to the Governor a copy of the judgment of the court in his favor, duly certified by the clerk, dated after the last day of the term, the Governor shall immediately issue a commission to such successful party. The certificate of the clerk showing either that the contest has been abandoned or the right to prosecute is lost by non-compliance with the provisions of law, the Governor shall issue his commission in favor of the person in whose favor the certificate of election has been granted. In either case the Governor shall only issue the commission upon the party complying with the other requirements of law."

By the express terms of the law the Governor, who was notified that Hughes' election was contested, had not the right, indeed he was prohibited from issuing a commission until the controversy was settled.

The commission, therefore, obtained by Hughes in contravention of a prohibitory law being an absolute nullity, furnishes not even *prima facie* proof of title to the office in dispute; and for that reason he must fail in his demand on the merits. But the plaintiff contends, and the majority of the court decides, that that part of the law on the subject of "contested elections" forbidding the Governor to issue commissions in contested election cases, pending such controversies, was repealed by the statute approved sixteenth of March, 1870, being act No. 100 of the acts of 1870. And section eighty-five is referred to to establish the position. It declares: "That all laws or parts of laws contrary to the provisions of this act, and all laws relating to the same subject matter are hereby repealed, and that this act shall take effect from and after its passage."

In order to determine the subject matter of the act let us look to its title. It is "An Act to regulate the conduct and to maintain the freedom and purity of elections; to prescribe the mode of making and designating the officers who shall make the returns thereof; to prevent fraud, violence, intimidation, riot, tumult, bribery, or corruption at elections, or at registration or revision of registration; to limit the powers and duties of the sheriffs of the parishes of Orleans and Jefferson; to prescribe the powers and duties of the board and officers of the Metropolitan Police in reference to elections; to prescribe the mode of entering on the rolls of the Senate and House of Representatives the names of members; to empower the Governor to preserve peace and order; to enforce the laws; to limit the powers and duties of the mayors of the cities of New Orleans and Jefferson with regard to elections; to prohibit district or parish judges from issuing certain writs to commissioners of election; to make an appropriation for the

expenses of the next revision of the registration and of the next election, and to enforce article one hundred and three of the constitution."

It was not the object of the act to repeal the sections of the Revised Statutes of 1870, on the subject of "contested elections," to which I have referred, because this is not mentioned in the title of the act No. 100 of the acts of 1870, as one of its objects. And if the repealing clause be considered sufficiently comprehensive to embrace those sections of the Revised Statutes, that part of the repealing clause would contravene article 114 of the constitution and be void, because such an object is not expressed in the title of the act.

But the repealing clause only repeals all laws upon "the same subject matter." There is nothing in the statute upon the subject matter of "contested elections."

The only law upon the subject matter of "contested elections" is to be found under that title or heading in the Revised Statutes, approved fourteenth day of March, 1870.

Now, can it be seriously contended that on the sixteenth March, only two days after the approval of the Revised Statutes, the lawgiver intended to repeal the enactment on the subject of "contested elections," when he passed the act No. 100 entitled "an act to regulate the conduct and maintain the freedom of elections," etc.; in which act there is not one word on the subject of contested elections and there is no such object expressed in the title.

Is the will of the lawgiver in regard to contested elections to be considered revoked because, two days after giving it, he sees fit to prescribe a general rule to regulate the conduct of elections? I think not. The two laws have separate and distinct objects. One to regulate the manner of holding an election and the other to remedy an evil that may arise out of that election. But it is contended that the repealing clause of act No. 100 of the acts of 1870 only repeals that part of the law forbidding the issuing of the commission by the Governor pending a contested election case.

To this the reply is that if it repeals any part of the contested election law it repeals the whole, because in order to give effect to the clause repealing "all laws on the same subject matter," it must be held that the sections of the Revised Statutes on the subject of contested elections are "on the same subject matter."

Now, can it be presumed that the lawgiver intended to repeal the law upon the subject of contested elections, and leave no remedy for the evil said law was intended to correct? Surely not. Such an intention can not fairly be deduced from the language of the law, and it is not in express terms declared.

But it is contended that if act No. 100 does not, in express terms, repeal the law upon the subject of contested elections, it does, by

implication, repeal that part of it forbidding the issuing of the commission pending a contested election suit. And in support of this position, that portion of the law is cited wherein the Governor is authorized to issue commissions within thirty days after the promulgation of the returns of the election, "to all officers thus declared elected, who are required to be commissioned."

The repeal of laws by implication is not favored; and where two statutes, having different objects in view, conflict in some of their provisions, it is a sound rule of construction to interpret the two laws so as to give effect, if possible, to both.

Here the law is, that the Governor shall issue commissions to all officers returned as elected within thirty days after said return. This is the general rule; and it has no application to cases of contested election; because there is nothing in the law showing that such was the intention of its authors, and because the time when, and the conditions upon which commissions might issue in contested election cases, were expressly provided for in a previous law, to wit: the Revised Statutes approved two days before, March 14, 1870. It is there provided that, "the judgment rendered upon the first finding of the jury shall be final, and on certifying the same to the Governor, a commission shall be issued in favor of the person in whose favor a verdict may be." "On the successful candidate furnishing to the Governor a copy of the judgment of the court in his favor, the Governor shall immediately issue a commission to such successful candidate."

Here, Hughes in advance of the trial of the contested election suit, procures from the Governor a commission for the office of parish judge, and upon this he claims possession of the office. Suppose he is successful in the contested election suit, will the Governor be required to issue to him another commission on being furnished with a copy of the judgment in his favor? Suppose his opponent gets judgment that he was the successful candidate, of course the Governor must issue to him a commission immediately on receipt of a copy of the judgment. Then there will be two commissions, two titles, issued for the same office, Hughes being in possession. Will his opponent be compelled to resort to a suit under the intrusion act to get the possession? Can a party, pending a controversy for the title and possession of an office, be compelled to resort to another action to obtain the possession which his adversary gained or took pending the action? Suppose the jury should find that there was no legal election of either of the contestants and "refer the same again to the people," will Hughes, who was never elected, be permitted to administer the office of parish judge? In my opinion all these difficulties will be obviated by simply giving effect and meaning to both laws, to wit: by holding that act No. 100 refers to elections not pending in a contested election suit. In such

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cases the Governor shall issue commissions within thirty days after the returns. This is the general rule. The exception is where the Governor is notified that there is a contested election suit pending. In such case it is neither the express nor implied intention of the law to give either of the contestants the title or the possession of the office till the controversy is judicially determined.

For the reasons stated I deem it my duty to dissent in this case.

 No. 2753.

H. PEYCHAUD, Liquidator, v. ARNOLD WEBER.

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On a motion to dismiss an appeal on the ground that the matter in dispute does not exceed five hundred dollars, the amount of defendant's liabilities on a stock note as stockholder in a company will determine the jurisdiction of the court and not the percentage claimed thereon. It must be first ascertained if he is liable on the stock note itself, as alleged in the petition.

When the object of a suit is to provide the means of paying the debts of a company, it is unnecessary to decide on an exception to the jurisdiction, whether the State courts can settle the affairs of an insolvent corporation.

A stockholder can not, when sued, call into question the name borne by a company and mentioned in his stock note at the time it was given, and it rests with him to show that the contribution called for is not needed.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. & P. Robert*, for plaintiff and appellee. *M. Grivot*, for defendant and appellant.

ON MOTION TO DISMISS THE APPEAL.

Justices concurring: Ludeling, Taliaferro, Howe.

LUDELING, C. J. The appellee has moved to dismiss this appeal on the ground that the matter in dispute does not exceed five hundred dollars.

The plaintiff sued defendant to make him contribute twenty per centum on his stock note, which plaintiff avers defendant executed in favor of the Great Southern and Western Life Accident Marine and Fire Insurance Company for \$800.

The defendant denied any indebtedness to the plaintiff. It seems clear that before decreeing the defendant to pay the twenty per centum demanded now, it must be ascertained whether he is liable as a stockholder to the extent of \$800, as alleged in the petition. The matter in dispute then exceeds five hundred dollars. 2 An. 909, *Williams v. Vance*; 15 An. 521, N. S.; and *T. R. R. Co. v. Hamilton*. Article 74 Constitution.

It is therefore ordered that the motion to dismiss be overruled.

WYLY, J., *dissenting*. The plaintiff, the liquidator of an insolvent insurance company, alleges that when he took charge of the corpora-

tion there were no funds to pay its debts, which amounted to some forty thousand dollars; "that your petitioner in his official capacity demanded from each of the stockholders of said company payment into his hands of a sum equal to twenty per cent. on the amount due on their stock notes, with which demand said stockholders have refused and neglected to comply. That Arnold Weber of this city is a subscriber to said corporation for ten shares of its stock and has furnished, given and delivered to said corporation his stock note for the sum of eight hundred dollars, dated eighteenth April, 1867, and payable on demand. "That said Arnold Weber is therefore indebted to said company, according to the call made by your petitioner, in the sum of one hundred and sixty dollars, being twenty per cent. on the amount of his said note, and being his proportion towards the payment of the debts of said company.

Wherefore petitioner prays, the premises being considered, that the said Arnold Weber be cited herein, and that after due proceedings had he be condemned to pay your petitioner, in his official capacity, the sum of one hundred and sixty dollars with legal interest from judicial demand and costs of suit."

The answer is a general denial, and a special denial that the defendant is a stockholder and in any manner responsible for the debts of the corporation as charged; "and if further answer be necessary, this respondent denies that plaintiff has any cause of action against him, and even were he a stockholder in said insurance company, he could not be held responsible as charged, as the plaintiff has not filed a tableau or statement of the claims against said association, whether real or pretended, so as to enable the stockholders to ascertain what proportion each stockholder would have to contribute towards the payment or liquidation of said indebtedness, and it is only by that means that a necessity of a contribution can be shown as against the stockholders and the amount to be paid. Wherefore he prays to be dismissed hence with costs "

From the pleadings it will be observed that the suit is for a money judgment. The matter in dispute is the sum demanded of the defendant. That sum the plaintiff alleges is one hundred and sixty dollars, and for which he prays judgment.

There is no reconventional demand set up, the prayer of the answer being simply that the defendant "be dismissed hence with costs."

The contest is, not to determine whether or not the defendant subscribed for ten shares of stock and executed the note; that might be, and yet plaintiff would have no cause of action, as in case the company had assets sufficient to pay its debts, or in the event its creditors should permit their claims against the corporation to become prescribed, voluntarily remitted, or otherwise extinguished.

Peychaud, Liquidator, v. Weber.

The prayer of the petition is, not for a decree that the defendant is a stockholder and has executed a certain note, but that the defendant "be condemned to pay your petitioner one hundred and sixty dollars with legal interest from judicial demand and costs of suit."

The prayer of the petition determines the character of the action. In it we also ascertain the sum in controversy.

It matters not out of what contract the sum demanded arose; whether it is part of a large or a small contract; whether the note in a suit is one of a series executed in a large contract of sale or not, it is the sum demanded in the suit; it is the amount of the note, if that be the basis of the action, regardless of the dimensions of the contract of sale out of which it sprung, that constitutes the amount in controversy, and the amount in controversy and not the dimensions of the contract out of which it arose, must alone be considered in ascertaining the jurisdiction of this court. Very often in large contracts, small sums are required to be paid in installments; yet in a suit to enforce the payment of one installment, I apprehend the amount of that installment, and not the amount of the contract out of which it proceeded, would be considered in order to ascertain the jurisdiction of the court.

In the case before us the plaintiff has no action for the amount of the note of \$800. He has no right to collect that. The cause of action is not the note, it is the obligation of each stockholder to contribute his share to pay the debts of the insolvent corporation. This is the obligation sought to be enforced, and which the defendant contends should not be enforced, that forms the basis of the present action.

As a stockholder the defendant had the right to participate in the profits of the company in proportion to the amount of the stock subscribed by him, so likewise he incurred the legal obligation to contribute his share to relieve the company of its losses or debts.

This legal obligation to contribute amounts to one hundred and sixty dollars as alleged by the plaintiff. It is the amount in dispute which being less than five hundred dollars is below the jurisdiction of this court.

I believe the appeal should be dismissed for want of jurisdiction, and therefore dissent from the opinion of the majority of the court.

ON THE MERITS.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

HOWELL, J. The plaintiff, as commissioner of the Great Southern and Western Life, Accident, Marine and Fire Insurance Company, sues the defendant to make him contribute twenty per centum on his stock note, given to the Great Southern and Western Insurance Company.

The defendant excepts to the authority of Peychaud to represent the plaintiff company or sue on the note given to one company to pay

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the debts of another, denying that any proceedings have been had against the Great Southern and Western Life and Accident Company to forfeit its charter and appoint a liquidator. He also excepts to the jurisdiction of the court *a qua* over the proceedings for the forfeiture of the charter and appointment of a commissioner, because the said proceedings showed the said company to be insolvent, and the United States District Court alone had jurisdiction thereof.

The answer to the first branch of the exceptions is that the record shows the Great Southern & Western Life, Accident, Marine and Fire Insurance Company and the Great Southern and Western Insurance Company are one and the same corporation, the names and kinds of business having been changed by notarial acts duly recorded; and that the appointment of Peychaud as commissioner embraces the affairs under each modification of the charter.

If there be any force in the second exception it comes too late. But the very object of this suit is to provide the means of paying the debts of the company, and it is unnecessary to decide whether the State courts can settle the affairs of an insolvent corporation.

Upon the merits the case is made out against the defendant. He gave his stock note to the company at the time it bore the name mentioned in the note, and it rested with him to show that the contribution called for is not needed.

Judgment affirmed.

 No. 2822.

E. J. HART & CO. v. JOHN NIXON & CO.

Where a judgment by default was entered before the delay required by law had expired, it will not be maintained as valid on the ground that it was not made final until after the usual delays and that the defendant, having thereby suffered no injury, can not complain. The words "ordinary course of practice" mean that the course which is positively commanded by the law shall be pursued.

There is no difference between entering a default a day too soon and confirming a default a day too soon. One delay is as imperative as the other.

There is no issue joined when the judgment by default has been improperly entered, and the judgment in confirmation has nothing to rest upon.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. H. J. Leovy* and *F. A. Monroe*, for plaintiffs and appellees. *Hays & New*, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro, Morgan and Wyly.

MORGAN, J. Plaintiffs sue the firm of John Nixon & Co., composed of John Nixon, Jr., and William S. Parham, for \$13,989 13, for goods sold and delivered.

Before the institution of this suit the firm of Nixon & Co. was dissolved. Nixon alone was personally cited.

The petition was filed on the first of June, 1869; citation issued on

the same day; service was made on the same day. On the eleventh of June default was entered against John Nixon and John Nixon & Co., and on the sixteenth of June the default was confirmed. On the fourth of April, 1870, Jennie C. Nixon, "administratrix of the succession of John Nixon, deceased," applied for and obtained an appeal from the judgment rendered, as above set forth.

A defendant is allowed ten days after service of petition and citation in which to answer the demand which is made against him. "In counting the ten days, neither the day when the citation has been served, nor the day when the delay expires are included." C. P. 180. Plaintiff was not entitled to a default until the twelfth of June. *Fowler v. Smith*. 1 Rob. 448.

"A judgment by default taken on the fifth day after service of citation on the defendants and afterwards confirmed, is illegal and null." *Arthur and another v. Cochran, Tutor*, 12 R. 43.

"A judgment by default, made final in eight days after service of citation, must be reversed." *Williams v. Dunn*, 2 An. 806.

The appellees admit that in the ordinary course of practice the judgment by default could only have been rendered on the twelfth of June, but they contend that inasmuch as this judgment by default was not confirmed until the sixteenth of the month, the appellant has suffered nothing and can not, therefore, complain. They also contend that there is a difference between entering a default a day too soon and confirming a default a day before it is due.

But it seems to us that "the ordinary course of practice" means that course which it is positively commanded by the law shall be pursued, and that when the law says that a default may be entered against a person who has been regularly cited and who has made no answer ten days after citation, it not only does not allow but will not permit a default to be taken nine days after citation, any more than it would one day thereafter. Neither do we see any difference between entering a default a day too soon and confirming a default a day too soon. One delay is as imperative as the other. The default can not be entered until after the full expiration of the tenth day after citation; the default can not be confirmed until after the full expiration of two days after the default has been entered; one follows the other, and both are regulated by the same law as to time.

The default having been improperly entered there was no issue joined when the judgment was rendered. There was nothing, therefore, for the judgment to rest upon.

It is therefore ordered, adjudged and decreed that the judgment of the court below be avoided, annulled and set aside, and that the case be remanded to be proceeded in according to law. Appellees to pay costs of appeal.

No. 4467.

STATE OF LOUISIANA ex rel. DANIEL B. GORHAM v. F. F. MONTGOMERY.

Police juries are not prohibited from appointing a district attorney *pro tempore* after the lapse of the thirty days mentioned in the statute creating that office. But in that event, the statute confers the same power on the parish judges, and the party that first exercises the power exhausts it. The purpose of the law is to guard against the probability of a vacancy.

A police jury is not a legislative body, and its members are not legislators who become *functi officio* with the expiration of the terms for which they were elected or appointed, but can lawfully administer the powers confided to them till their successors are elected and qualified. Revised Statutes of 1870, sec. 2608.

The term of office of the District Attorney is four years, and the District Attorney *pro tem.* holds office for the same period. Revised Statutes of 1870, sec. 1178.

A police juryman is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace.

That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office.

A PPEAL from the Thirteenth District Court, parish of Carroll.
Hough, J. *Hiram R. Steele*, District Attorney, for relator and appellee. *W. B. Spencer*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Kennard.

WYLY, J. The District Attorney, on the information of D. B. Gorham brings this suit in the name of the State under the intrusion act, to have the defendant declared an intruder into the office of district attorney *pro tem.* and to have said Gorham decreed to be entitled to said office and inducted therein. The demand was rejected by the court below and the plaintiffs have appealed.

It appears that Gorham was appointed in December, 1870, to fill the vacancy occasioned by the resignation of H. W. Drake, and that he continued to administer the office of district attorney *pro tem.* till the twenty-fifth November, 1872, when the defendant was appointed to said office by the police jury of the parish of Carroll and took charge thereof, after qualifying, according to law.

The relator contends—

First—That his term of office had not expired on twenty-fifth day of November, 1872, the day when the defendant was appointed by the police jury.

Second—That the police jury had no right to make the appointment because under the law the appointing power was alone with the parish judge.

Third—That if the police jury had power to appoint, it could not exercise it on the day of the appointment of the defendant, twenty-fifth November, 1872, because that body being a legislative body was then *functus officio*, the terms of its members having expired before twenty-fifth November, 1872.

The law authorizing the appointment of district attorneys *pro tem.* declares that:

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“ Within thirty days after the date of the promulgation of this act there shall be appointed a district attorney *pro tempore* in each parish in this State, except the parish of Orleans, by the police jury of the parish. And in the event of the failure of the police jury to make such appointment, and in the event of the death, resignation or other disability of such district attorney *pro tempore* to attend to the duties required of him in this act, the parish judge shall fill the vacancy by appointment, to continue for the time for which the district attorney for the district was appointed or elected. The district attorneys *pro tempore* authorized to be appointed by section 1178 of this act shall hold their offices for and during the same period the district attorney for the judicial district was elected or appointed. * * * ” Revised Statutes of 1870, sections 1178 and 1879.

The term of office of the district attorney is four years ending on the first Monday of November (Constitution articles 92 and 153), and the district attorney *pro tem.* holds office for the same period. Consequently on the twenty-fifth of November, 1872, the term of D. B. Gorham as district attorney *pro tem.* for the parish of Carroll, had expired. That the police jury may appoint a district attorney *pro tempore* after the lapse of the thirty days mentioned in the act, was expressly decided in the State ex rel. Rills v. Lynch, 23 An. 786.

In that case the court held that: “ The statute does not prohibit the police juries from making the appointments after the thirty days, but in that event the statute confers the same power on the parish judges. The purpose of the law was to guard against the possibility of a vacancy in the office, and after the expiration of thirty days either the police jury or the parish judge can appoint a district attorney *pro tempore*, and the party which first exercised the power exhausted it.” See also 3 An. 195; 14 An. 207; Cooley's Constitutional Limitations, 77. This disposes of the first and second grounds set up by the relator.

The third ground is equally untenable. The police jury is not a legislative body whose members become *functus officio* at the expiration of their terms of office, and who do not hold over till their successors are chosen and inducted into office. Police jurymen are the officers of a political corporation, and they continue in office after the expiration of their terms till their successors are inducted into office.

“ All officers, whether appointed or elected, shall hold their offices and discharge the duties thereof until their successors are elected or appointed, as the case may be, and duly qualified.” Revised Statutes of 1870, section 2603.

The relator, however, argues that police jurors are legislators, and not officers; because it was decided in the case of Voorhies v. Fournet, 15 An. 598, that Fournet, the clerk of the district court of the parish of St. Martin, could hold the office of police juror of said parish on

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the ground that "a police jurymen is not an officer" in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That decision merely shows that the inhibition of the constitution referred to only applied to constitutional officers. It did not prevent a constitutional officer from holding a municipal office, and this was only affirming the doctrine laid down in *Dorsey v. Vaughan*, 5 An. 155, and in *State v. Blanchard*, 6 An. 516. Because the office of a police juror is not a constitutional office, it by no means follows that it is no office at all. There are many offices that were not created by the constitution; and the General Assembly had undoubted authority to create them. Now if the officers of the various political corporations of the State had no other warrant for holding over till their successors were inducted into office, except article 122 of the constitution conferring this right, perhaps they would not be authorized to hold over on the theory that article 122 referred to the incumbents of State offices and not to those of a political corporation. And this would be the analogy from the decisions cited by the relator. But the statutes of the State provide that "All officers whether elected or appointed shall hold their offices and discharge the duties thereof until their successors are elected or appointed, as the case may be, and duly qualified." So, therefore, whether article 122 of the constitution applies or not to officers of a political corporation is of no consequence. Because the clause of the statute quoted applies to every officer of the State, whether he holds a State, parish or municipal office, or the office of any political corporation. In the constitution is found ample authority for the General Assembly to create political corporations and to create offices by which they may be administered; but that instrument will be searched in vain to find authority to create a legislative department. It declares, article 15, that: "The legislative power of the State shall be vested in two distinct branches, the one to be styled the house of representatives, the other the senate, and both the general assembly of the State of Louisiana."

It is therefore evident that the police jury is not a legislative department, and that its members are not legislators who became *functus officio* with the expiration of the terms for which they were elected or appointed.

The police jurors of the parish of Carroll had therefore authority to continue in office after the first Monday of November, 1872, and could lawfully administer the powers confided to them till their successors were elected and qualified. At the time of the appointment of the defendant, twenty-fifth November, 1872, their successors were not elected and qualified. Our conclusion is that there is no error in the judgment of the court *a qua* rejecting the demand of the plaintiff.

Judgment affirmed.

No. 4541.

CARROLL, HOY & CO. v. ELIZA SEIP AND PETER ANDERSON.

here it was contended that two judgments were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed ;

Held—That the prescription of the judgments was properly interrupted, because citation was served personally within ten years. Whether the application was made in one petition or in two is immaterial. The decree of revival for both judgments was rendered contradictorily with the defendant, who was personally cited within ten years. There is no law requiring this decree arresting prescription to be registered.

A judicial mortgage, like any other, must be reinscribed within ten years from the first inscription in order to preserve the rank acquired by said inscription.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. A. Hunter and R. J. Bowman*, for plaintiffs and appellants. *Manning*, for defendants and appellees.

WYLY, J. On April 4, 1857, A. and J. Dennistoun & Co. obtained two judgments for large amounts against the defendant, Eliza Seip, and they were duly recorded on the ninth of the same month. The records of the parish being destroyed, these judgments were again put on record in December 1865. A. and J. Dennistoun & Co. filed their petition to revive their judgments, and citation was served personally on the thirteenth March, 1867, within ten years from the rendition of said judgments.

On twenty-ninth May judgment of revival was rendered, and it was recorded two days thereafter. On this judgment execution issued, and the defendant, Peter Anderson, for \$8000 purchased the property now sought to be subjected to the conventional mortgage granted by Mrs. Seip to the plaintiffs on the second March, 1861.

The plaintiffs allege that their mortgage is superior in rank to the one under which Peter Anderson purchased :

First—Because the judgments of A. and J. Dennistoun & Co. were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed.

Second—Because the judicial mortgages which arose from the inscription of the two judgments rendered in 1857, were separate and distinct mortgages, and the pretended judgment of revival was not a continuance thereof.

Third—Because the judgment of revival, if valid, was not rendered and recorded within ten years from the rendition of said judgments.

Fourth—Because after ten years from the date of said judgments, to wit. April 4, 1857, their inscription unaccompanied by the inscription of the judgments of revival was no longer evidence of their existence, and consequently no notice.

In answer to the first proposition we will remark that the prescription of the judgments was properly interrupted, because citation was

served personally within ten years. This meets the requirements of the law.

Whether the application was made in one petition or in two is immaterial. The application was distinctly made for the revival of both judgments, and the decree to that effect was rendered contradictorily with the defeudant who was personally cited within ten years.

In reply to the second and third points we will say: The decree of revival interrupted the prescription of the judgments, and we know of no law requiring the decree arresting prescription to be registered.

In answer to the fourth point we will remark that a judicial mortgage, like any other, must be reinscribed within ten years from the first inscription, in order to preserve the rank acquired by said inscription. It appears that A. and J. Dennistoun & Co. registered their judgments on ninth April, 1857, and also in December 1865. The judicial mortgages of A. and J. Dennistoun & Co. had not perempted when the sale occurred, and the sale to Peter Anderson was valid because made under judgments superior in rank to the mortgage set up by the plaintiffs. As the proceeds were insufficient to pay A. and J. Dennistoun & Co., the prior mortgage in favor of the plaintiffs ceased to exist on the property from the day of the sale.

There are other questions, but as the question of superiority of mortgage is the only one in which the plaintiffs have an interest, they will not be noticed.

Judgment affirmed.

Rehearing refused.

No. 4569.

HARRIET A. MILLS v. SHERIFF OF EAST FELICIANA and als.

Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it;

Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract.

APPEAL from the Fifth Judicial District Court. *Posey*, J. Jury trial. *McVea & Kilbourne*, for plaintiff and appellee. *H. A. Cross* and *B. R. Forman*, for defendants and appellants.

Justices concurring: Ludeling, Howell, Morgan.

MORGAN, J. The ground upon which the plaintiff obtained her injunction in this case is that the sheriff of the parish of East Feliciana has seized and is about to sell a certain piece of property belonging to her, by virtue of a *fi. fa.*, and an order of seizure and sale directed to him from the Fourth District Court of New Orleans, which property,

Harriet A. Mills v. Sheriff of East Feliciana and als.

she alleges, is her homestead, and is protected from seizure by the homestead law of 1865.

There was a verdict and judgment in her favor and the defendants have appealed.

The property, the sale of which was enjoined by plaintiff, was mortgaged to Beard, plaintiff in execution and seizure and sale, on the eighth October, 1865. The homestead law was not passed until the twenty-second of December of that year. Consequently it does not control Beard's right. *Rousse v. Caradine*, 20 An. p. 244.

It is contended that the mortgage was not recorded until after the passage of the homestead law, and that it is therefore governed by it. In this there is error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties—not parties to the contract.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, reversed and annulled, and that the injunction herein issued be dissolved, appellees to pay the costs.

Rehearing refused.

No. 4542.

JOHN W. JOHNSON v. GUSTAVE AND HYPOLITE LABATT.—E. J. BARRETT, Intervenor.

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105	485

The parish court charged with the duty of settling successions has nothing to do with the partition of property held in indivision where the matter in dispute exceeds five hundred dollars.

APPEAL from the Parish Court, parish of Rapides. *Daigre, J. R. A. Hunter* and *G. L. Hall*, for plaintiff and appellant. *Wm. A. Seay*, for defendants and appellees. *M. Ryan*, for intervenor.

Justices concurring: Ludeling, Taliaterro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff, who purchased the interest of one of the heirs of Francis and Ann Labatt sues the defendants, the other two heirs, for partition of the estate. The court dismissed the suit for want of jurisdiction *ratione materiae*, the petition alleging that the matter in dispute exceeds one thousand dollars. The plaintiff appeals.

The appellant contends that the parish court had jurisdiction; because, although the heirs have held and possessed the succession for over thirty years and there has been no administration, the succession of their ancestors has never been opened and settled according to law, and the parish court having jurisdiction to open and settle all successions, has jurisdiction to partition the property in this case regardless of the amount or value thereof.

We find that the heirs have possessed the property since the death of their parents, a period of nearly forty years, and if there were debts they have paid them. It is well settled that where the heirs take possession of the property, in a case like this, the succession ceases to exist. The parish court charged with the duty of settling successions, has nothing to do with the partition of property held in indivision, where the matter in dispute exceeds five hundred dollars.

Judgment affirmed.

Rehearing refused.

No. 4535.

J. D. BLAIR & CO. v. DANIEL TAYLOR AND JACOB IRVING.—BERNARD McFEELY, Third Opponent.

There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court.

The mere recital of an act of mortgage in a subsequent act acknowledging the obligations contained in the first act, does not, as to third parties at least, operate the reinscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription as to the debt, but does not reinscribe the mortgage which secured it.

Where the plaintiff's mortgage was in existence at the time of the sheriff's sale, and the mortgaged property was adjudicated to him, he had the right to retain the purchase money up to the amount of his debt, and the title to the property should have been made to him.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. T. O. Manning*, for plaintiffs and appellants. *R. A. Hunter and G. L. Hall*, for third opponent and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

MORGAN, J. Plaintiffs obtained an order of seizure and sale against a certain piece of property situated in the town of Alexandria, upon a mortgage given to them on the third July, 1867, by one Nelson Taylor, to secure the payment of a promissory note payable on the fifteenth November, 1867, for eleven hundred and sixty-seven and twenty one-hundredth dollars, with interest at eight per cent. after maturity.

Nelson Taylor, the mortgageor, surrendered the property mortgaged to his assignee in bankruptcy, who, by order of court, sold the same, subject to all the mortgages, liens and incumbrances resting thereon. It was in the possession of Daniel Taylor, holding for himself or Jacob Irving (the defendants) when seized by the sheriff.

Prior to the day upon which it was advertised to be sold, Bernard McFeeley, filed his third opposition, in which he alleges that Nelson Taylor owes him seven hundred and fifty dollars, with five per cent. interest from the twenty-first December, 1859, to secure the payment of which he claims to hold a special mortgage, with vendor's lien and

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45	1157
25	144
117	252

privilege on the property then to be sold by the sheriff, which mortgage, lien and privilege, he contends, was only recorded in the office of the recorder of mortgages where the property mortgaged was situated.

He alleges further that he obtained a release of the property from the assignee in bankruptcy upon the payment of about five hundred and fifty dollars; that this release was necessary in order to protect it from being absorbed; that it was as much in the interest of plaintiffs as his own that this release was effected, and that they are bound to colate and refund to him a *pro rata* portion of the money expended by him in the protection and preservation of the property in question.

He claims that he is entitled to be paid out of the proceeds of the sale which was to take place by preference and privilege over all others, the amount of his alleged mortgage claim, and the costs incurred by him for the preservation of the property.

Blair & Co. deny McFeeley's mortgage; that if it ever existed it was lost for want of reinscription. They allege that the pretended mortgage given in 1866 is not a re-establishment of the mortgage of 1859, under the act of the Legislature, and that it is not a valid original mortgage for want of essential features prescribed for such instruments by the laws.

The sheriff returns that, after due advertisement, he offered the property for sale, on the second July, 1870, upon which day the third opposition of McFeeley was served on him, commanding him to retain in his hands five hundred and fifty dollars of the proceeds of the sale, if so much remained in excess of the special mortgage and vendor's lien in favor of McFeeley; that after declaring the conditions of the sale, and the amount of the third opposition, he cried the property at public auction, when Blair & Co., through their counsel, bid the sum of \$1025, and that being the highest bid, the property was adjudicated to them. That he then called on their counsel to comply with the terms of the sale, and the demands of the third opposition, which he refused to do. That he then notified the counsel that he would offer the property again immediately at his risk, which he did on the same day, when the last and highest bid of \$1200 having been made by Bernard McFeeley, the same was adjudicated to him.

Before, however, the second adjudication was made, Blair & Co. took a rule upon the sheriff to show cause why he should not make title to them of the property seized under their execution and purchased by them, alleging that he refuses to make title unless they will pay into his hands the whole amount of their bid, because McFeeley had filed a third opposition, claiming that he has a mortgage upon the property sold for \$1144, or thereabouts, which he alleges is prior to theirs. They allege that no such mortgage exists or is upon the re-

records of the recorder's office, for that or any other sum in favor of McFeeley, and that if he ever had such mortgage it has been and is extinguished.

First—Because the notes which McFeeley holds, and which he claims are obligations of Nelson Taylor, are prescribed as to said Taylor.

Second—Because the mortgage which McFeeley claims upon the property sold is perempted for want of reinscription in ten years, the same purporting to have been given on the twenty-first December, 1859, and that it has not been reinscribed ; and

Third—Because the loss of the public records of his mortgage (if such be alleged) has not been supplied as by law provided and permitted.

The second sale and adjudication was made in spite of this rule, and the title was transferred to McFeeley.

Before answering to the merits of the rule, McFeeley excepted to the proceeding, upon the ground that plaintiffs could not proceed by rule to test his right of mortgage, or his title to the property which he holds under the conveyance made to him by the sheriff, but that he should have been proceeded against by the direct revocatory action. The exception was referred to the merits and overruled.

It is urged in this court that this judgment was erroneous, and that the exception should have been maintained.

We are not of the opinion that the authorities cited by McFeeley's counsel show an error in this ruling of the court. The decision in the case of *Weeks v. Flower and als.*, 9 La. 379, is that where a purchaser is in possession under a conveyance, the question of fraud can not be inquired into collaterally, in a case commencing with a seizure ; that the party complaining must bring a direct action.

In *Kirkland against the Gas Company*, 1 An. 299, it was held that where the purchaser of an immovable is in possession under a conveyance not void upon its face, in order to annul the sale for fraud, recourse must be had to a direct action.

In *Weld v. Peters*, 1 An. 432, the court say that a judgment creditor can not treat a sale of a slave made *bona fide* by his debtor and accompanied by possession, as null, and seize the slave in the hands of the purchaser.

In *Nimmo v. Allen*, 2 An. 451, it was held that where the creditors of a vendor wish to annul a sale on the ground of fraud, they must resort to a direct action. But we know of no statutory provision of law which compels a plaintiff in execution to bring a direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has, we believe, always been to proceed by rule, and this practice has

been expressly recognized by the adjudications of this court. In *Larthet v. Hogan and al.* 1 An. 330, it was held that where the property of one against whom judgment has been rendered appears to be subject to privileges or mortgages, entitled to a preference over the judgment creditor, the latter may, by a rule to show cause, as incidental to the proceedings had for the purpose of selling the property, call upon those claiming such privileges or mortgages, to show cause why they should not be erased. The seizing creditor can not be required to resort to a direct action against persons holding such privileges or mortgages. And this decision was recognized as the law of the case in *Merrick v. McCausland*, 24 An. 256.

We therefore think that the exception was properly overruled.

On the merits, we think that the claim for \$550, alleged by McFeeley to have been paid by him to the assignee in bankruptcy, admitting it to be valid if it existed, which we do not pass upon, has not been proved. Indeed we have searched the record in vain for any testimony to establish that it was ever paid.

As to his claim on account of the purchase price of the property sold, we think it is barred by prescription. The original act of sale was passed on the twenty-first December, 1859, and the notes given in payment therefor were payable in one and two years from that date. The last note was, therefore, due on twenty-first December, 1861. His claim never seems to have been advanced until he filed this opposition on the thirtieth June, 1870. The last note was prescribed on the twenty-first December, 1866.

He contends that prescription has been interrupted, and the debt acknowledged in time to save him. But we do not think he has been successful.

It is true that on the second March, 1866, John Clark, Nelson Taylor and McFeeley, went before the recorder of the parish of Rapides and declared that, whereas, on the twenty-first January, 1860, John Clark transferred to Taylor the property sold under Blair's execution in this case; and that the said Taylor, in full payment for said property, assumed the payment of and bound himself to take up the one-half of the following described notes, to wit: The three following notes, executed by John Clark to and in favor of Bernard McFeeley, dated December 21, 1859, (describing the notes), the three said obligations being mortgage notes, with vendor's privilege on the property sold by McFeeley to Clark, by act executed before Kilpatrick, recorder, on the twenty-first December, 1859, the one-half of which was on the date first herein above mentioned, sold to said Taylor by Clark, at which time McFeeley promised to accept Taylor for the payment of the one-half of said notes, said one-half of the same amounting to \$1000, all of which was passed before the said recorder and duly recorded in

Blair & Co. v. Taylor and Irving.

his office, the records of which were destroyed by fire on the fourteenth May, 1864. Now, therefore, appeared before the recorder, John Clark, who declared that the sale then passed to Taylor and herein before described was valid, and that he did then and there make a title to said Taylor, guaranteeing him in the same, and that the said Taylor assumed to take up one-half of the amount due by him to McFeeley as hereinbefore stipulated, the first note of which has been taken up and paid, viz., \$500, and that this instrument is executed and signed in lieu of the one passed and destroyed on the fourteenth May, 1864.

But it was the act of 1859 which put the mortgage on the property, and we do not find that this act has ever been reinscribed. It is true it is referred to in the act of 1860, and in the act of 1866, but we do not think that the mere recital of an act of mortgage in a subsequent act, acknowledging the obligations contained in the first act, as to third parties at least, operates the reinscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription as to the debt, but it does not reinscribe the mortgage which secured it, and it is the question of the peremption of the mortgage—not the debt—which is in controversy here. We think the opponent's mortgage, created in 1859, expired in 1869, and that plaintiffs' mortgage having been in existence at the time of the sheriff's sale, he had a right to retain the purchase money up to the amount of his debt, and that the title to the property should have been made to him.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be avoided, annulled and reversed, and it is further ordered, adjudged and decreed that the sheriff of the parish of Rapides do make title to the property herein sold by him to the plaintiffs upon their complying with the terms of their bid, over and above the sum due to them on account of their mortgage, and that the mortgage claimed by Bernard McFeeley be declared extinguished as regards Blair & Co., and of no effect.

Rehearing refused.

State ex rel. Pintado v. Judge of the Fifteenth Judicial District.

No. 4620.

25	164
116	591

STATE ex rel. E. G. PINTADO v. JUDGE OF THE FIFTEENTH JUDICIAL DISTRICT.

25	149
e119	893

Under sections 2595, 2605, R. S., relative to contested elections and the whole tenor of the intrusion law, defendant in the court below, and relator here on application for a mandamus, could waive the delay for answering and have a day designated for trial without waiting until issue was joined by said answer. Whether the nature of the defense developed in the answer when filed would have authorized a continuance on behalf of the plaintiff is not a question in this case. If the plaintiff is debarred from asking for a jury to be summoned and for a continuance to that effect, it is by his own fault. There was no legal and valid reason for continuing the case as was done, and the plaintiff had no right to a trial by jury as was accorded to him, inasmuch as he did not ask for one in his petition and procured the discharge of a jury that was present, to whose sufficiency and competency as jurors no objection was made, and by whom the defendant in the court below and relator here expressed a willingness to have his case tried immediately. Plaintiff's subsequent application for a jury was obviously for delay. The law makes this class of cases summary in form of proceeding. For these reasons the mandamus prayed for is made peremptory and the judge *a quo* is ordered to set down relator's case for trial by preference over all other cases and without a jury on the second day of the regular term of his court, April 8, 1873, and to have notice thereof immediately given to the parties.

A PPLICATION for a Mandamus against the Judge of the Fifteenth Judicial District, parish of Assumption. *James Augustin*, for relator. *Judge Beattie*, in *propria persona*.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

HOWELL, J. The relator alleges that on the fifth of February, 1873, in the suit of the State represented by the district attorney *pro tempore* v. E. S. Pintado, No. 1893 of the docket of the district court for the parish of Assumption, he was enjoined from acting as the clerk of the court of said parish, for which he held a commission, or interfering with E. L. Hebert as such clerk, in whose behalf the said suit was instituted under the intrusion law, and who signed the said writ of injunction; that on the fifteenth of said month, while his answer was in course of preparation, being anxious to have his title to said office adjudicated upon immediately, he petitioned the judge of the district court, under section 2605 R. S., to designate a day for the hearing of said cause at chambers; that the judge thereupon called a special term of the court on the third of March, 1873, and, upon his own motion, ordered a special jury to be drawn for said special term, in accordance with sections 1426, 1427 and 1428 R. S., relating to contested elections; that on said day, being ready for trial and having filed his answer, he was met by an exception to a trial on the part of the district attorney *pro tempore*, on the ground that the order of the fifteenth of February, "directing a special term of the court to be holden on the third March, 1873, and ordering a jury to be impaneled for said special term was improvidently granted, the same having been rendered *ex parte* and *ex officio*, before either or any of the parties to the proceeding had prayed for a jury trial herein, and before the cause was at issue in any manner, and before any legal notice was given to

any of the parties intrusted herein, nor has any legal notice been given to the parties intrusted since said order was granted. Wherefore exceptor; alleging that the cause is not yet at issue, prays that the said order of the fifteenth of February, 1873, be rescinded and set aside, and now exceptor, plaintiff herein, prays for a trial by jury in this case, and that this court do now order the holding of a special term of this court for a trial of this cause on legal notice being given to the parties interested, and that a special jury be now summoned according to law to try the same, and for all and general relief;" that in reply to said exception relator urged a trial on that or the next, or any early day, being willing to try the case either before the court or a jury, as a jury was present, although irregularly ordered, and although plaintiff's prayer for a jury was too late, not having been made in the original petition as is necessary in these summary cases; that the district judge refused to try the case, rescinded the order of the fifteenth February, discharged the jury in attendance and ordered the case to stand until the next regular term of the court, beginning on the first Monday, the seventh day of April, 1873; that he has cause to apprehend a mistrial or another continuance at the April term from the fact, among others, that the said district attorney *pro tempore* has instituted suit, under the intrusion law, against the sheriff of said parish and his competitor, thereby making the sheriff as well as the clerk interested parties, and he prays for a mandamus to compel the district judge to fix the said case for trial at chambers without a jury and upon ten days notice, or if plaintiff be entitled to a jury under the circumstances, then that the case be fixed for trial at chambers before a special jury for the purpose, within ten days.

The judge says that the facts stated by the relator are correct so far as he knows, but under his interpretation of the ruling in the case of the State v. Head, 22 An. 54, no jury could be ordered except when prayed for, and that when prayed for, a special term under section 1932 R. S. must be called; that the answer was only filed on the third March, and the case could not be fixed for trial until the answer was in, and until the case was fixed for trial all parties had a right to trial by jury; that he refused to call a special term because there was not the necessary time to give the notices required by law before the regular session, which begins on the first Monday in April, and that he can not state whether or not a jury, which he granted can be had at the said April term.

The first and principal question necessary for decision in this proceeding is, did the relator, defendant in the suit below, have the right to have the case set down for trial before he filed his answer; and, secondly, did such action debar the plaintiff therein from asking for a jury to be summoned, and a continuance for the purpose?

State ex rel. Pintado v. Judge of the Fifteenth Judicial District.

Both questions, we think, should be answered in the affirmative. Section 2595 R. S. declares that such cases are "to be tried with preference over all other cases, without being fixed for trial after issue joined;" and section 2605 provides that they "may be tried before the district judge in chambers, or at a special term called by said judge on legal notice being given the parties interested; and if required by either party, the judge may order a special jury, to be summoned according to law, to try such case."

There can be no doubt that, if the defendant in said case, the relator here, had filed his answer when he asked the judge to designate a day for the trial of the case, the plaintiff's right to demand a jury on the day so fixed for trial would have lapsed under the general rules relating to jury trials in civil cases. And we think it clear from the foregoing provisions and the whole tenor of the intrusion law that the said defendant could waive the delay for answering and have a day designated for the trial without waiting until issue was joined. Whether the nature of the defense developed in his answer when filed would have authorized a continuance on behalf of the plaintiff is not a question in this case. The plaintiff had the opportunity and the right to ask for a jury in his original petition. And whether the judge had the right of his own motion to order a jury it is unnecessary now to decide. There was a jury in attendance to whose sufficiency and competency as jurors no objection was made, and the defendant expressed a willingness to have the case tried immediately before them, and it may be that the judge could have ordered the trial to proceed before the said jury if he believed a jury trial right and important. Be that as it may, we are clear in the opinion that there was no valid, legal reason for continuing the case as was done, and that the plaintiff therein has no right to a trial by jury, as was accorded to him, inasmuch as he did not ask for one in his petition, and he procured the discharge of the jury that was present. His subsequent application as made was obviously for delay. The law makes this class of cases summary in form of proceeding. It is unnecessary to pass on any other questions presented by the judge, or as to how or where a jury is to be summoned, as the case will come on in the regular term, it must be tried under section 2595 R. S.

It is therefore ordered that the mandamus herein be made peremptory, and that the district judge set down the case of the State ex rel. Walter Guion, district attorney *pro tempore*, v. E. G. Pintado, No. 1893 of the docket of the district court for the parish of Assumption, for trial with preference over all other cases and without a jury, on Tuesday the eighth of April 1873, being the second day of the next regular term of said court, and that notice thereof be immediately given to the parties.

WYLY, J., *dissenting*. In my opinion this court has no authority to fix this case for trial in the district court on Tuesday, eighth April, 1873, because there is no law authorizing this court to fix cases for trial in the district court, and there is no law giving this court a supervisory control over the action of that court. Besides, according to the letter of the intrusion act no fixing is necessary by any court.

As the writ of mandamus can only be used in aid of the appellate jurisdiction of this court, that jurisdiction can be maintained if the case is tried on any day of the term as well as on Tuesday, the eighth April, 1873.

The law does not require the district judge to fix a particular day for the trial of this case, and this court ought not by mandamus to command him to do what the law does not require.

The law does not declare that the State, the prominent litigant in intrusion suits, shall forfeit the right of jury trial if not asked for in the petition; and this court ought not to enforce a forfeiture not prescribed by law.

Any ordinary litigant has the right, at least before issue joined, to amend his pleadings and pray for a jury or anything else. Why may not the State?

Because the law officer of the State, the district attorney *pro tem.*, neglected or failed to pray for everything he wanted in the petition, is the State to be barred from the common right of every suitor. The right to amend his pleadings before issue joined? I think not.

But it is contended that as the judge of his own motion ordered a jury, the State should have accepted it, and having refused it, the State had no right to pray for a special term and for a jury—that this shows that the object of the prayer was purely for delay. The jury called at chambers by the judge without the prayer of either of the litigants and before issue joined, was a jury not convened according to law and it was not obligatory on either of the litigants to accept it. Therefore no right was lost by refusing it. The charge that the sworn officer of the State, the district attorney *pro tem.*, is merely maneuvering for delay in demanding what is believed to be a legal right is, in my opinion, gratuitous.

The answer of the judge is that he designated the third March for trial at chambers. No special term was called or held. Therefore there was no fixing of the case at a term of the court.

The question is, had the State the right, before issue joined, to call for a special term and for a jury?

This was the question presented in the case of Head, 22 An. 54, and this court said: "The defendant in his answer prayed for a trial by jury, but the judge *a quo* refused to allow the same. In this we think

there was error. The act of 1868, No. 156, under which this action was instituted no where deprives the defendant of the general right to a jury. It is provided by the thirteenth section that 'all the cases coming under the provisions of this law may be tried by a judge of the district in chambers, or at a special term called by said judge, on legal notice being given to all parties interested; and if required by either party the judge may order a special jury to be summoned according to law, to try such case.' We apprehend the meaning of this section to be that the cause may be tried in chambers if neither party asks for a jury, but if a jury be prayed for it will be necessary when a speedy trial is desired and a regular term is not in session, to appoint a special term and to summon a jury therefor under the power conferred by the last clause of the section."

In that case the defendant on the day designated for trial at chambers filed his answer and prayed for a jury. In this case on the day designated for trial in chambers the plaintiff before issue joined, prayed for a special term and a jury. In that case this court considered that the judge erred in not continuing the case and calling a special term. Here the court holds that the judge erred in permitting the trial at chambers to be delayed on account of the application for a special term and a jury.

In the light of the statute as interpreted by this court in the Head case, I do not think the district judge erred in delaying the trial at chambers in consequence of the application for jury, because this court expressly decided the meaning of the law to be "that the cause may be tried in chambers if neither party asks for a jury, but if a jury be prayed for, it will be necessary when a speedy trial is desired and a regular term is not in session, to appoint a special term and summon a jury."

I believe the court in the Head case properly interpreted the law, and that either party when the case is set for trial at chambers may have a continuance and require a special term and a jury. The statute provides that the jury "be summoned according to law." I understand this to mean that the jury must be convened according to law—that is, the jury must be convened at the general term or a special term of the court; because there is law providing for a jury at such terms, and there is no law providing for a jury at chambers. Therefore a jury summoned at chambers would not be summoned or convened according to law.

I think the district judge committed no error; that under the ruling in the Head case he properly deferred the trial at chambers, in consequence of the prayer for jury; and finding that the regular term of his court would arrive before a special term could be convened he did not

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err in delaying the case for trial at the regular term beginning April 7, 1873. Whether or not there will be a failure of a jury at that session remains to be determined when the court opens. If there should be a failure of a jury at said term, however, it will be the duty of the judge to call a special term. Until he fails to do so, the writ of mandamus should not be used against him.

I therefore dissent in this case. 'r

No. 4600.

25 154
105 783

SUCCESSION OF JESSE C. PATRICK. Application of L. L. BUTLER, Executor, for sale of property to pay debts.—Intervention of JOSEPH C. GOODRICH, creditor.

Where a judgment creditor with special mortgage and vendor's privilege caused a *fi. fa.* to be issued by the district court against the property of a succession, which *fi. fa.* was enjoined by the executor of said succession, and where, whilst the injunction was pending said executor applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction for the purpose of paying the debts of the succession, and the court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ;

Held—That the court erred in not granting the order prayed for by the executor. Succession property can not be sold under a *fi. fa.* The executor was in possession of the property when seized, and the probate court had jurisdiction to order the sale.

The creditor had a mortgage on the property, but he saw fit to pursue the *via ordinaria*, and having elected that mode of procedure, he could not have been allowed to change it after he had obtained judgment, even if he had attempted to do so, which he has not done.

No injury can result to the judgment creditor by authorizing the sale prayed for by the executor if he has a mortgage superior to other creditors.

APPEAL from the Parish Court, parish of West Baton Rouge. *Lobdell, J. H. M. Favrot*, for intervenor and appellee. *Barrow & Pope*, for executor and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

LUDELING, C. J. Mrs. Ursin Soniat had a judgment against the succession of Patrick which she transferred to J. C. Goodrich. He caused a *fi. fa.* to be issued under said judgment, and under it the sheriff seized property of the succession, to sell which an order had previously been petitioned for by the probate court, to enable the executor to pay the debts of the succession. The executor it seems enjoined the sale under the judgment of Soniat, and Favrot, the *curator ad hoc*, appointed to represent Goodrich, the transferee of Soniat's judgment, in the injunction suit, filed for Goodrich on intervention opposing the application as far as it sought to sell the property, which had been seized by the sheriff under the said writ. Waiving the question whether a *curator ad hoc* had a right to interfere in any other proceeding or suit than that in which he was appointed to act, we are of the opinion that the court erred in not granting the order prayed for by

Succession of Patrick.

the executor to sell the property to pay the debts of the estate. Succession property can not be sold under a *fi. fa.* 1 An. 173.

The executor was in possession of the property, and the probate court had jurisdiction to order the sale. The creditor had a mortgage on the property but he saw fit to pursue the *via ordinaria*, and having elected that mode of procedure he could not have been allowed to change it after he had obtained a judgment, even if he had attempted to do so, which he has not done. 2 La. 547. No injury can result to the judgment creditor if he has a mortgage superior to other creditors, by authorizing the sale by the executor.

It is therefore ordered and adjudged that the judgment of the lower court be amended as follows: It is decreed that the sale of all the property belonging to the succession of Jesse C. Patrick be sold to pay the debts of the succession, according to law. It is further ordered that the intervenor, Goodrich, pay the costs of the intervention and of this appeal.

WYLY, J., *dissenting*. Mrs. Ursin Soniat, the holder of certain promissory notes of J. C. Patrick, secured by vendor's privilege and special mortgage, sued in 1867, in the district court of the parish of West Baton Rouge, to obtain judgment and to foreclose the mortgage against the succession.

After a protracted litigation there was a foreclosure of the mortgage ordered against the land described in the act, and a personal judgment for half the amount of the demand, the other half being held to be not reversable in consequence of its slave consideration. Mrs. Soniat subsequently transferred this judgment to J. C. Goodrich, who caused execution to issue against the hypothecated property.

The executrix of Patrick enjoined the sale in the district court, and before the trial thereof applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction suit, against which the mortgage had been foreclosed as aforesaid.

The curator, representing Goodrich, intervened on the following grounds:

First—That two courts can not at the same time have jurisdiction of the same property, and until the injunction is tried in the district court the property should remain in the custody of the sheriff, its executive officer; that the sheriff, as executive officer of the district court, ought not to be placed in a position where obedience to its orders would be disobedience and contempt to the mandate of the parish court.

Second—That the holder of a mortgage importing a confession of judgment can subject the property to its payment, regardless of the

manner of foreclosure, and whether the mortgageor be dead or not. The court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ. 12 An. 591. The executrix of J. C. Patrick has appealed.

The question whether a mortgageor who forecloses his mortgage *via ordinaria* can proceed directly against the property without resorting to the remedy provided in articles 990 and 991, C. P., is raised in the injunction suit pending in the district court.

In my opinion the property being under seizure in that court under its own process, and enjoined by the executrix on the grounds stated, ought not to be ordered to be sold by the parish court pending that controversy; and the parish judge did not err in refusing to grant the order. The parish court ought not by its own orders to disturb the jurisdiction of the district court, and in a case like this undertake to dispose of a controversy pending in that court. I adopt the written opinion of the judge *a quo* on this point.

But laying out of view the question of the jurisdiction of the parish court, I am of opinion that the district court had jurisdiction to enforce, by its own process, the mortgage foreclosed *via ordinaria* against the property in possession of the executrix of Patrick. A creditor having an executory title may subject the property to the payment of the mortgage whether it be foreclosed *via ordinaria* or *via executiva*. The right to subject the property to the payment of a mortgage importing a confession of judgment, is not a conditional but an absolute right, resulting from articles 61, 62, 63, 65 and 66, C. P., and articles 1421, 1433 and 1438 of the Revised Code.

The law gives the right to a creditor holding an executory title "to seize and sell the hypothecated property (in possession of the heirs) the same as if the original debtor were alive," C. P. 66; and there is nothing in it declaring that this right shall be forfeited if the mortgage be closed *via ordinaria* instead of *via executiva*. I imagine that a right accorded by law will not be lost if the owner thereof seeks to enforce it by either of the modes provided by law.

The subject of the articles referred to is the giving of the right, and not the mere machinery by which that right may be enforced. It was upon the principle that the hypothecary action is a real action following the property in whosoever hands it may be found, and being a real action it may be brought in a court of ordinary jurisdiction; that this court decided as early as 1846 that a creditor having a special mortgage importing a confession of judgment may obtain in a court of ordinary jurisdiction an order of seizure and sale against the hypothecated property under administration.

This was the doctrine announced in *Boquille, administrator, v.*

Faillie. 1 An. 205. In that case this court said: "It is true that, as a general rule, probate courts have exclusive jurisdiction of money demands against successions, but the rule is not without exceptions. C. P. 996, 983. The right of the hypothecary creditor to proceed against the mortgaged property in the possession of the debtor's heirs appears to be beyond controversy. The Code of Practice after declaring the hypothecary action is a real action, which follows the property to which it is attached in whatever hands it may be found, provides that if the debtor has died leaving a single heir who has accepted the succession, or if he leaves several heirs who have accepted the succession, and there has been no partition among them, the creditor shall be entitled to seize and sell the hypothecated property in the same manner as if the original debtor were still alive. Being a real action it may be exercised in courts of ordinary jurisdiction." C. P. 983, 61, 67, 734, 744; C. C. 1370, 1382, 1387, 1391.

Since 1846 this court has frequently affirmed this doctrine. 2 An. 509; 12 An. 551; 19 An. 510; 20 An. 374; but these cases were all under executory process.

The only case where the question was presented in a proceeding *via ordinaria* is that of *Randolph v. Heirs of Chapman*, 21 An. 436, where it was held that: "The holder of promissory notes secured by mortgage on real estate importing a confession of judgment, may proceed *in rem* after the mortgageor has died, to foreclose the mortgage without provoking the appointment of an administrator to represent the succession. Where the act of mortgage imports a confession of judgment and no partition of the estate has been made among the heirs, the mortgage creditor may seize and sell the hypothecated property as if the original debtor were still alive. If the widow and heirs of the deceased husband, whose property is specially mortgaged be non-residents, the mortgage creditor in a suit against the mortgaged property may provoke the appointment of a curator *ad hoc* to represent them."

It is the character of the instrument and not the mode of enforcing it that gives the "executory title against the debtor," and authorizes the creditor, under article 66, C. P., to "seize and sell the hypothecated property (in possession of the heirs in the same manner) as if the original debtor were still alive."

A mortgage retains its hypothecary character as thoroughly when it is foreclosed *via ordinaria* as *via executiva*. It is directed against the thing as much in one form of procedure as in the other; and in this respect it is as much a real action in the one case as in the other.

If article 66, C. P., means what it says, and such has been affirmed repeatedly by this court, the death of the mortgage debtor in no manner affects the right of the mortgage creditor, because he can "seize and sell the hypothecated property (in possession of the heirs in the same

manner) as if the original debtor were alive." Therefore, as Mrs. Soniat could subject, in a proceeding *via ordinaria*, the hypothecated property in Patrick's possession to her special mortgage, she has the same right to do so when the property is in possession of his executrix. It is conceded that she could do so by proceeding *via executiva*; but the cases decided in 3 N. S. 498, 655 and 8 N. S. 96, are cited to show that she can not do so *via ordinaria*. Those cases will be searched in vain to find anything supporting that conclusion.

In those cases the question was whether the hypothecary creditor can at the same time proceed *via executiva* and *via ordinaria*, and the court said: "In the present case an attempt is made to combine two actions, ordinary and extraordinary; and the order of seizure and sale seems to have been granted before the answer was filed. * * * The manner of proceeding attempted by the plaintiffs is not an attempt to cumulate different causes of action in one suit, but to pursue one course of action by claiming the benefit of two remedies for a single wrong which appears to us to be unjust, oppressive, contrary to reason and of course contrary to law." 3 N. S. 498.

In the case at bar two actions have not been combined; but Mrs. Soniat has merely cumulated two different causes of action in one suit, to wit: a personal action against the succession and an hypothecary action against the mortgaged property. So far from violating the principles announced in the decisions opposed to her, Mrs. Soniat has followed their direction.

In the succession of Wilson, 12 An. 592, this court said: "Lastly, it is urged that the notes of the mortgage having been merged in a judgment they become extinguished by novation, though it is admitted that the judgment itself decrees that the mortgage shall remain in force to secure the payment of the judgment. If this doctrine were correct, the highest possible recognition of a right would virtually extinguish it."

Here Mrs. Soniat having the highest possible recognition of her mortgage right, is opposed in the execution thereof, solely on the ground of said recognition. Without this recognition it is admitted the mortgage would entitle her to seize and sell the hypothecated property on an *ex parte* order at chambers.

Now, if the character of her mortgage will authorize the seizure and sale of the hypothecated property on an *ex parte* order of the judge, why will it not authorize the same on an order obtained after a fair trial contradictorily with the mortgageor or his legal representative?

It is the judicial recognition of the act importing a confession of judgment that authorizes the seizure and sale; and surely that recognition is just as solemn and authoritative when granted contradictorily with the parties as when granted *ex parte*.

Succession of Patrick.

But the case of *Bertin v. Phillips*, 1 An. 173, is cited as authority against the Soniat mortgage.

That case is not in point, and is no authority here. In it the question was, whether an ordinary judgment on a privilege debt could be enforced by the seizing thereunder of a slave belonging to the succession of the judgment debtor; and the court properly held that succession property could not be sold in that way. That case was not based on a special mortgage, importing a confession of judgment, and of course it did not fall under article 61, 62, 63, 65 and 66 C. P. The case of *Elmore v. Ventress*, 24 An. 382, is directly in point. There the precise question is decided in accordance with the views I herein express. For the reasons stated I feel constrained to dissent in this case.

Rehearing refused.

No. 2884.

HENRIETTA CROCKER and als. v. J. F. HOAG and CHARLES H. REED.

25	159
52	1754

Where A had the right to sell the share she claimed to have in a piece of property, it is immaterial to inquire whether she owned any portion of said property. Having sold the whole of it and received the price thereof, she was bound to complete the title, and the moment she acquired the same, it inured to and vested in her vendees. Their title became as complete as if she had executed to them a deed immediately after she had acquired said property. Her reconveyance of it to him from whom she had purchased it, passed no title. It was the sale of another's property, and therefore a nullity.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Trist & Oliver*, for plaintiffs and appellees. *Whitaker & Rice*, and *Fellows & Mills*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly and Morgan.

WYLY, J. This is a petitory action against the defendants for certain property situated on Rousseau street, described in the petition. Hoag being only the tenant of Reed makes no defense. The property belonged to Elkanah Reed, who died in 1850, leaving a widow and two children, the defendant, Charles H., about six years old, and Sarah Ann, aged about eighteen months. In 1851 Sarah Ann died. In 1853 the widow owning one undivided portion of said property, being 55-512 thereof, the share inherited from her deceased daughter, conveyed to the plaintiffs by notarial act, duly recorded, the whole property, stipulating that, "if hereafter any claim should be urged or set to any portion of the above described property on account of the surviving heir and minor child of the deceased Elkanah Reed, and Charles Henry Reed, she, the said vendor, hereby agrees and

Henrietta Crocker and als. v. Hoag and Reed.

obligates herself to satisfy and extinguish such claim without prejudice or loss to the purchasers."

In February, 1868, the defendant, Charles H. Reed, being of full age, conveyed by notarial act his undivided shares, being 357-512 parts thereof, of said property to his mother, the vendor of the plaintiffs. The deed was duly recorded and the consideration was acknowledged to be \$8000 cash.

In January, 1869, the property was reconveyed to Charles H. Reed by his mother for \$7000, three thousand cash and the balance evidenced by a note. The plaintiffs contend that although their vendor only owned part of the property in 1853, she sold the whole of it to them, and that their title became complete in 1868 when Charles H. Reed conveyed his share or interest in the property to his mother; that this sale inured to their benefit. To this the respondent replies, that the title set up by the plaintiffs is null and void; because his mother sold them the property in 1853, without any order or authority of the court having jurisdiction of the estate of Elkanah Reed; that the signature of his mother to said act was obtained by fraud and (procured to be) made thereto by one Elisha Croker, who pretended to act for petitioners, and that said act was passed without consideration. He further pleads that said property was conveyed to him by his mother by authentic act on fifteenth January, 1869. The plea of fraud and failure of consideration is not sustained by the evidence. Whether there was an order of court or not, the mother of the respondent had the right to sell her share of the property. Whether she owned any of the property or not, is immaterial, having received the price for the whole property, the mother of the respondent was bound to complete the title, and the moment she acquired it in 1868, it inured to and vested in her vendees, the plaintiffs. Their title became as complete as if she had executed to them a deed immediately after receiving title from her son.

The reconveyance to Charles H. Reed in 1869, passed no title, because the moment he deeded the property to his mother in 1868, the title instantaneously passed to her vendees, the plaintiffs. It was the sale of another's property and therefore a nullity.

We therefore conclude that the judgment herein in favor of the plaintiffs is correct.

Judgment affirmed.

See 9 La. 99; 5 An. 532; 12 La. 170; 5 N. S. 247; 12 M. 187; Revised Code 3144, 3304; 18 An. 321.

Rehearing refused.

State ex rel. Strauss v. Dubuclet, State Treasurer.

No. 4031.

25	161
119	487

STATE OF LOUISIANA ex rel. JACOB STRAUSS v. ANTOINE DUBUCLET,
State Treasurer.

This court, where there is a doubt as to its jurisdiction, would maintain it in a case in which the whole people of the State are interested, and if this were necessary in order to protect them from what may be, and as in this case appears to be, a fictitious claim upon the common treasury.

It does not follow that, because the State has appealed through the Attorney General, she can not appeal through the Governor as well. He clearly has the right to appeal on behalf of the State, and this right can not be taken away from him, simply because another officer of the government has been before him, when he takes the appeal within the delays required by law. In this case the appeal was taken in ample time.

It is not legally correct to say that no person is authorized to appeal on behalf of the State, except in cases where the attorney general is unable or unwilling to act. The prohibition is limited to the employment of counsel other than the Attorney General by the Treasurer and Auditor, and does not exclude the Governor from doing so.

Judgment in this case being rendered on the thirteenth of May, signed the same day, and the appeal taken on the seventeenth of May, being made returnable on the third Monday of said month, there was a good reason for extending the return day from the third Monday of May, only a few days after the judgment was rendered, until the first Monday in November: that being the first return day after the first Monday in May, on which this court would sit.

Where the Auditor had no authority to draw the warrants he issued, the fact of his drawing them would create no debt against the State, and if issued with the intention of defrauding the State, the Treasurer is not bound to pay them, simply because they may happen to be in the hands of an innocent holder.

Something more than the genuineness of the Auditor's signature and the lawfulness of the issue is required to protect the holder of State warrants, innocent though he may be. Not being commercial paper, they can be transferred only by the indorsement of the parties in whose favor they were issued. The genuineness of that indorsement must be proved.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. W. H. Rogers*, for relator and appellee. *Semmes & Mott, Hays & New*, and *S. Belden*, Attorney General, for respondent and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

MORGAN, J. Two appeals were taken from the judgment herein rendered in favor of Jacob Strauss. One was taken by the attorney general, and one was taken by special counsel appointed by the Governor.

The one by the Attorney General was taken on the seventeenth May, 1872, and was made returnable on the third Monday in May. The other was taken by the special counsel employed by the Governor on the eighteenth May, and was made returnable on the first Monday in November.

We are asked to dismiss the second appeal on the following grounds:

First—"That an appeal having been taken on behalf of the State of Louisiana by the Attorney General of the State, and made returnable on the third Monday of May, no other appeal on behalf of said State could be taken pending the said first appeal, and the action herein taken thereafter in the lower court on behalf of said State was and is null and void, for want of jurisdiction."

State ex rel. Strauss v. Dubuclet, State Treasurer.

Second—"That no person is authorized to appeal on behalf of the State, except in cases where the Attorney General is unable or unwilling to act; that such facts do not exist herein, and, therefore, the Governor was without power to employ counsel."

Third—"That the appeal was made returnable at a day other than as assigned by law, and no reason existed therefor."

This proceeding was instituted on the twenty-fifth April, 1872. The relator's object is to force the State Treasurer to recognize, as legal and binding debts of the State, certain warrants held by him, issued by Wickliffe, and to cause them to be paid out of the State treasury.

The warrants amount to within a fraction of \$140,000.

The answer is that they are fraudulent and spurious, and that the indorsements therein are forgeries.

The case was tried on the eighth May. It appears that these warrants, coming into the hands of auditor Graham, who succeeded Wickliffe, were marked by him "counterfeit," that he could find no traces of their having been issued in the books of his office, and that he had examined many of the parties in whose favor they purported to have been drawn, and in whose names they were indorsed, and that they all declared their signatures to be forgeries. Notwithstanding which, not one of these parties, although many of them are residents, and well known citizens of this city, were ever examined as witnesses, nor does any attempt seem to have been made to procure their testimony.

Judgment was rendered in favor of the relator as prayed for, on the thirteenth May, and was issued on the same day.

On the seventeenth May, the attorney general, intervening on behalf of the State, moved for an appeal, returnable on the third Monday in May. His transcript of appeal was not filed on the return day, nor was any application made to this court to extend the time in order to enable him to bring it up, and the relator's judgment has thus, in his opinion become final, and the State is to be saddled with the payment of \$140,000, of which, the whole according to Auditor Graham, and the Attorney General, is spurious, unless we maintain the appeal taken by the special counsel of the State, which the relator says the law prohibits us from doing.

Where there is a doubt as to the jurisdiction of the court, we would maintain our jurisdiction in a case in which the whole people of the State are interested, and if this were necessary, in order to protect them from what may be, and, as in the matter before us appears to be, a fictitious claim upon the common treasury.

But in this case we are not called upon to do so. The letter, as well as the spirit of the law gives us the required jurisdiction.

First—It does not follow that because the State has appealed through the Attorney General that she can not appeal through the Governor,

State ex rel. Strauss v. Dubuclet, State Treasurer.

as well. He clearly has the right to appeal, on behalf of the State, and this right can not be taken away from him, simply because another officer of the government has been before him, when he takes the appeal within the delays required by law. In this case the appeal was taken in ample time.

Second—It is not legally correct to say that no person is authorized to appeal on behalf of the State, except in cases where the Attorney General is unable or unwilling to act. The prohibition is limited to the employment of counsel other than the Attorney General by the Treasurer and Auditor, and does not exclude the Governor from doing so.

Third—There was a good reason for extending the return day from the third Monday of May, only a few days after the judgment was rendered, until the first Monday in November, that being the first return day, after the first Monday in May, upon which this court would sit.

And we must believe that the Attorney General was of the opinion that these objections could not be well urged against the State, otherwise we take it for granted that he would have filed his transcript of appeal in time. He must have believed that the appeal taken by him had been superseded, for we can not believe that he could have been guilty of the carelessness of allowing a judgment to become final, upon a claim involving so enormous a sum of money, which claim he had denounced as spurious and forged, and from the judgment recognizing it to be valid he had appealed. He must have considered that the State was protected by the appeal taken by the special counsel employed by the Governor, and in this opinion we think he was right.

The motion to dismiss is refused.

ON THE MERITS.

The warrants upon which these proceedings are had, were drawn by Wickliffe, in favor of various parties. They have come into the possession of the relator. He and his employes say he got them in the usual course of business. Employes in the Auditor's office say that they appear to be drawn in the form generally used by Wickliffe, and that they believe his signature to them genuine. This may all be true. But if Wickliffe had no authority to draw the warrants, the fact of his drawing them would create no debt against the State; if they were uttered with the intention of defrauding the State, as is alleged in the answer, the treasury is not to be depleted to pay them, simply because they may happen to be in the hands of an innocent holder. Besides, something more than the genuineness of the Auditor's signature, and the lawfulness of the issue is required to protect the holder, innocent

State ex rel. Pintado v. Judge of the Fifteenth Judicial District.

err in delaying the case for trial at the regular term beginning April 7, 1873. Whether or not there will be a failure of a jury at that session remains to be determined when the court opens. If there should be a failure of a jury at said term, however, it will be the duty of the judge to call a special term. Until he fails to do so, the writ of mandamus should not be used against him.

I therefore dissent in this case. ✓

No. 4600.

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105 783

SUCCESSION OF JESSE C. PATRICK. Application of L. L. BUTLER, Executor, for sale of property to pay debts.—Intervention of JOSEPH C. GOODRICH, creditor.

Where a judgment creditor with special mortgage and vendor's privilege caused a *fi. fa.* to be issued by the district court against the property of a succession, which *fi. fa.* was enjoined by the executor of said succession, and where, whilst the injunction was pending said executor applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction for the purpose of paying the debts of the succession, and the court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ;

Held—That the court erred in not granting the order prayed for by the executor. Succession property can not be sold under a *fi. fa.* The executor was in possession of the property when seized, and the probate court had jurisdiction to order the sale.

The creditor had a mortgage on the property, but he saw fit to pursue the *via ordinaria*, and having elected that mode of procedure, he could not have been allowed to change it after he had obtained judgment, even if he had attempted to do so, which he has not done.

No injury can result to the judgment creditor by authorizing the sale prayed for by the executor if he has a mortgage superior to other creditors.

A PPEAL from the Parish Court, parish of West Baton Rouge. *Lobdell, J. H. M. Favrot*, for intervenor and appellee. *Barrow & Pope*, for executor and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

LUDELING, C. J. Mrs. Ursin Soniat had a judgment against the succession of Patrick which she transferred to J. C. Goodrich. He caused a *fi. fa.* to be issued under said judgment, and under it the sheriff seized property of the succession, to sell which an order had previously been petitioned for by the probate court, to enable the executor to pay the debts of the succession. The executor it seems enjoined the sale under the judgment of Soniat, and Favrot, the *curator ad hoc*, appointed to represent Goodrich, the transferee of Soniat's judgment, in the injunction suit, filed for Goodrich on intervention opposing the application as far as it sought to sell the property, which had been seized by the sheriff under the said writ. Waiving the question whether a *curator ad hoc* had a right to interfere in any other proceeding or suit than that in which he was appointed to act, we are of the opinion that the court erred in not granting the order prayed for by

Succession of Patrick.

the executor to sell the property to pay the debts of the estate. Succession property can not be sold under a *fi. fa.* 1 An. 173.

The executor was in possession of the property, and the probate court had jurisdiction to order the sale. The creditor had a mortgage on the property but he saw fit to pursue the *via ordinaria*, and having elected that mode of procedure he could not have been allowed to change it after he had obtained a judgment, even if he had attempted to do so, which he has not done. 2 La. 547. No injury can result to the judgment creditor if he has a mortgage superior to other creditors, by authorizing the sale by the executor.

It is therefore ordered and adjudged that the judgment of the lower court be amended as follows: It is decreed that the sale of all the property belonging to the succession of Jesse C. Patrick be sold to pay the debts of the succession, according to law. It is further ordered that the intervenor, Goodrich, pay the costs of the intervention and of this appeal.

WYLY, J., *dissenting*. Mrs. Ursin Soniat, the holder of certain promissory notes of J. C. Patrick, secured by vendor's privilege and special mortgage, sued in 1867, in the district court of the parish of West Baton Rouge, to obtain judgment and to foreclose the mortgage against the succession.

After a protracted litigation there was a foreclosure of the mortgage ordered against the land described in the act, and a personal judgment for half the amount of the demand, the other half being held to be not reversable in consequence of its slave consideration. Mrs. Soniat subsequently transferred this judgment to J. C. Goodrich, who caused execution to issue against the hypothecated property.

The executrix of Patrick enjoined the sale in the district court, and before the trial thereof applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction suit, against which the mortgage had been foreclosed as aforesaid.

The curator, representing Goodrich, intervened on the following grounds:

First—That two courts can not at the same time have jurisdiction of the same property, and until the injunction is tried in the district court the property should remain in the custody of the sheriff, its executive officer; that the sheriff, as executive officer of the district court, ought not to be placed in a position where obedience to its orders would be disobedience and contempt to the mandate of the parish court.

Second—That the holder of a mortgage importing a confession of judgment can subject the property to its payment, regardless of the

Delphine St. Amand v. Long.

tion at the suit of creditors of the heirs of Mrs. St. Amand, and F. A. Luling became the purchaser. He renewed the suit in his own name at the date last mentioned against Long alone, praying to be decreed owner and for damages, etc. Service of this petition and the accompanying citation was made on one Lawless as the agent of Long. To this proceeding Long excepted on the ground of want of citation. He denied that Lawless was authorized to receive citation, and averred that the defendant was in no manner bound by the service made upon Lawless. On the eighth of April, 1871, final judgment was rendered in favor of Luling against Long, decreeing Luling to be owner of the lands in contestation, and rejecting the plaintiff's prayer for damages. There has been an effort to blend this action brought by Luling with the case number four hundred and nine, the possessory action, in which Long and Boutte answered, but without effect.

It is clear there was no issue joined either in the petitory action brought by Mrs. Amand and continued by her heirs, or in that instituted by Luling in his own name. The first suit was a possessory action against Long and Boutte, alleging disturbance of possession and asserting a claim for damages, and praying to be quieted in her possession. The number of the suit is 409. The suit No. 414 is distinctly a petitory action describing additional tracts of land not mentioned in the possessory action and claiming a much larger sum as damages, and is brought against Long alone. The supplemental petition which sought to change the nature of the original action by claiming title, and converting the possessory into a petitory action, was never put at issue either by exception, answer or judgment by default. Article 55, Code of Practice, forbids the cumulation of petitory and possessory actions except by consent of parties. In a possessory action title is not at issue, and judgment should not be given on the titles of the parties; 4 M. 626, 5 M. 635; and the prayer of the petition characterizes it, and defendant can not change it into a petitory one; 16 La. 44, 7 Rob. 109; and even defendant can not reconvene by setting up title; 7 N. S. 488, 10 La. 140. When there is no answer to an amended petition, nor default taken, especially if the amendment be one of substance and not of form, all subsequent proceedings are irregular and will be set aside. 1 M. 206; 8 N. S. 298; 2 La. 130; 4 La. 13. "If there be no answer nor default, there is no *contestatio litis*, which is the very foundation of the suit; all subsequent proceedings are irregular and will be set aside and the cause remanded, or the appeal dismissed. 5 N. S. 515; 15 La. 209; 2 An. 352; 9 An. 417; 18 An. 187."

As there was no *contestatio litis* in this case it follows that the judgment rendered can have no force or validity. The exception to the service of citation upon Lawless in Luling's suit against the defendant Long,

Delphine St. Amand v. Long.

was well taken. No authority of any kind in Lawless as Long's agent is shown. 16 La. 570; 10 La. 593; 19 An. 360

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled and reversed. It is further ordered that this case be remanded to the lower court to be proceeded with according to law, the plaintiff and appellee paying costs of this appeal.

No. 4489.

JOSEPH BOUDREAUX v. F. P. MARTINEZ and als.

25 187/
115 1087

In the case of a dormant or secret partner, although credit is manifestly given only to the ostensible partner, no other party being known, yet it is not deemed an exclusive credit, but is binding upon all for whom the partner acts, if done in their business and for their benefit.

The creditor is not affected by the State of affairs between the partners *inter se*. A deceit or fraud between them has nothing to do with their obligations towards third persons who are not party to it.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Taylor Beattie, J. Arthur F. and Clay Knobloch*, for plaintiff and appellant. *E. W. Blake*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

TALIAFERRO, J. Martinez, a merchant of New Orleans, having claims against Louis J. Meyer, a merchant of Thibodaux, in the parish of Lafourche, for merchandise furnished him, brought two suits against him in the parish court of Lafourche, and obtained judgments. Execution was issued and the stock of goods in the store of Meyer was seized. Thereupon Boudreaux, the plaintiff in this case, sued out a writ of injunction restraining Martinez and the sheriff from further proceeding with the seizure and sale and made Meyer a party to this injunction suit. Boudreaux alleges that he is the partner of Meyer and the owner of one undivided half of the stock of goods so seized. He contends that Martinez has no right to seize partnership property on a judgment rendered against an individual member of a commercial firm. He avers that to the knowledge of Martinez, Meyer possesses in the parish of Lafourche unincumbered property in his own right to the amount of ten thousand dollars, and far more than sufficient to discharge the amount of the judgments obtained by Martinez against Meyer.

The plaintiff charges collusion between Martinez and Meyer to procure a sale of the stock of merchandise by which his share and interest therein may be divested at a great sacrifice and injury to him and to their advantage. He prays to be declared owner of an undivided half share of the stock of merchandise; that the injunction be perpetuated, and that he recover one thousand dollars actual damages and five thousand dollars exemplary damages.

The answer of Martinez is a general denial. He specially alleges that he dealt with Meyer alone without knowledge of the plaintiff as having any interest in the business of Louis J. Meyer, to whom alone he gave credit. He prays judgment dissolving the injunction, with twenty per cent. damages on the amount enjoined, and special damages for attorney's fees to the extent of two hundred and fifty dollars. Meyer, for answer, admits the interest of the plaintiff in the store, but, avers that the plaintiff "was ever and purely a silent partner therein," the whole of the establishment being in the name of and its affairs administered entirely by the respondent Meyer. That the indebtedness to Martinez arose from the purchase of goods for the common benefit of himself and plaintiff, that the debt was contracted on partnership account and should be paid out of partnership property. He prays judgment in his favor, with damages, etc.

Judgment was rendered dissolving the injunction with twenty per cent. on the amount of the judgment enjoined. Seventy-five dollars special damages for attorney's fees. That as to L. J. Meyer and the sheriff the injunction be dissolved at plaintiff's costs and without damages. From this judgment the plaintiff has appealed.

It is pressed upon the consideration of the court that Martinez brought his suit against one of the partners only, and that he can only recover judgment against him individually and enforce that judgment against the individual property of that partner, and could only seize the residuary interest in the partnership of the partner sued in default of individual property. We do not understand the character of the action to be such as described by the plaintiff in injunction. The evidence is clear that the commercial transactions of L. J. Meyer and the plaintiff Boudreaux were carried on exclusively by and in the name of L. J. Meyer alone. Boudreaux was unknown to the world as a partner. Martinez in answer to an interrogatory put to him swears that previous to furnishing Meyer with the goods he never heard that Boudreaux had any interest in the concern. Boudreaux himself, on cross examination, said: "I am a partner of Mr. Meyer, but my name is not known. I was not known by Martinez except what Mr. Meyer told them. Merchandise came marked L. J. Meyer alone. I know that Mr. Meyer was doing business with Mr. Martinez. I never authorized Mr. Meyer to do anything connected with the store. Mr. Meyer knew what to do himself. He bought the goods. Mr. Meyer made all the purchases in New Orleans."

It is beyond all question that Boudreaux was a mere passive member of the partnership, having an interest in it but taking no active part in its business operations and unknown to the world as having any share or interest in its affairs. In bringing suit against L. J. Meyer, Martinez sued the firm. He knew no other firm than that of L. J. Meyer.

Boudreaux v. Martinez and als.

He supplied the store with goods. It is shown that the goods went into that store and were sold for the profit and benefit of all concerned in that establishment. Boudreaux claimed and was entitled to a share of the profits of that store. Shall he be heard to say that he will reap the benefits of its operations and share in none of its liabilities? But on the part of the plaintiff it is contended and much pains have been taken to show that there was a collusion between Meyer and Martinez to defraud and injure the plaintiff. The fact that Meyer wrote to Martinez to bring suits in the parish court against him; that Meyer confessed judgment in these suits; the seizure of the stock of goods and other acts are pointed out as indicating a concocted plan to enable Meyer to purchase the entire stock of merchandise at a low price and thus enrich himself at the expense of and by the injury of the plaintiff. If Meyer was acting fraudulently and in bad faith with Boudreaux, we do not see that Martinez is implicated with it. The alleged fraud and misconduct of Meyer as affecting Boudreaux can not be inquired into in this case.

The liability of secret or dormant partners in commercial partnerships in all cases like the present is so well established and so universally recognized that authorities need scarce be referred to.

“In the case of a dormant or secret partner the credit is manifestly given only to the ostensible partner, for no other party is known. Still, however, it is not treated as an exclusive credit, for the law in all cases of this sort founds its decision upon the ground that the creditor has had a choice or election of his debtor, which can not be where the partner is dormant or unknown. The credit therefore is not deemed exclusive but binding upon all for whom the partner acts, if done in their business and for their benefit as in cases of agency for an unknown principal.” Story on Partnership, sec. 138; also same work, sec. 139; also pages 227, 257.

In the case of Scanell v. Payne & Harrison 5 An. 255 this court said in relation to deception practiced by one partner upon another, “the validity of the transactions between the bank and the parties who effected the loan and consented to its application, is not affected by the state of affairs between the partners *inter se*. A deceit between partners has nothing to do with their obligations towards third persons who are not privy to it. There is no evidence of any connivance on the part of the bank.” The decision of the court *a qua* is clearly correct.

It is therefore ordered that the judgment of the district court be affirmed with costs in both courts; but without prejudice to the plaintiff Boudreaux, to have his legal recourse against his partner, Louis J. Meyer, on account of any matters growing out of their partnership.

Rehearing refused.

No. 2806.

L. CHARLES PERRET v. NEW ORLEANS TIMES NEWSPAPER.

The publication of any communication with or without the name of the author, which is defamatory and false, subjects the publisher as well as the author to damages in favor of the party aggrieved.

The law looks to the *animus* of the publisher in permitting his columns to be used as a vehicle for the dissemination of calumny. In such a case, it is not incumbent upon the party assailed by defamation to show malice against himself on the part of the publisher, nor to prove that he has received injury by the publication. If the charges are false, the law implies malice in the publisher—not a malice which means a spite against the individual, but *malus animus*—a wanton disposition grossly negligent of the rights of others; and the injury inflicted is not repaired by the subsequent retraction or apology of the publisher, however promptly it may be made.

The proprietor of a newspaper is not exonerated from responsibility, because the libelous matter appearing in his paper was inserted without his knowledge, or approbation, or even against his wishes. He is responsible for the acts of his agents and employees.

It is not sufficient for his exoneration that the printer, by naming the author, gives the party aggrieved an action against him.

A reparation by recantation can only be considered in estimating the amount of damages.

In an action of libel it is not necessary to prove any special damage to recover.

By the statute of 1855, Revised Statutes p. 706, sections 3640 and 3641, the truth of libelous matter may be pleaded in justification, and if it shall appear that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J.* Jury trial. *Labatt & Aroni*, for plaintiff and appellant. *Alexander Walker, J. Ligan* and *Garrett Walker*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAFERRO, J. This is an action of slander. The plaintiff alleges that the defendant is liable to him in damages to the amount of ten thousand dollars, for the publication of a card signed by some unknown and irresponsible persons whose residence is unknown and whose names are fictitious, containing false, malicious and libelous charges against him by which he has been greatly injured and damaged in the estimation of his friends and the public. The card complained of is couched in these words:

“NEW ORLEANS, February 19, 1869.

“We, the undersigned, most respectfully lay before the public the following very astonishing facts that took place last night near the Carrollton depot: While we were on our way home from Carrollton to New Orleans, three police officers of the above place assailed us with revolvers pointed to us, to deliver every cent we had about us. All the money that we had was five dollars, and on delivering the same they left off. What sounds more horrible is that these so called officers were accompanied by his honor Judge Perret, judge of Carrollton and Canal avenue.

“Signed,

JOHN BRIANT,
D. L. THOMPSON,
W. B. SAVORY,
H. B. DELORD,
JAMES B. RUBB,

No. 413 Frenchman street.”

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111 387

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1116 708

The answer is a general denial. The defendant admits that the instrument so signed was published, as charged by plaintiff, but says it was published as an advertisement; that it was received by one of the employes of the establishment at a late hour of the night, and during the absence and without the knowledge of the proprietors of the newspaper. He specially denies that the said advertisement contains any libelous or slanderous charges or imputations that could damage plaintiff, and he specially denies that such publication was made with any malicious intent on the part of the respondent.

The case was tried before a jury which rendered a verdict in favor of the defendant.

The plaintiff has appealed.

A bill of exceptions, taken by the plaintiff to the charge given to the jury by the judge on the trial of the case below, presents for our consideration several important questions arising in this case. The plaintiff insists that the judge erred in expounding to the jury the law relating to the publication of libels, and thereby misled the jury and caused their verdict to be rendered for the defendant.

These portions of the charge more especially excepted to are in the following words: "But this malice, whether express or implied, may be refuted, and it devolves upon the defendant to produce such proof. It is competent for him, as going to show the want of malice, to prove that the article was published without his knowledge; that it came to the paper through the ordinary channels of public news; that the parties from whom it was received were men about whose credibility there existed at the time no reasonable suspicion. These remarks apply to the liability of proprietors of newspapers for publishing libelous articles, either as editorials or as anonymous communications, but I take it sound reason and justice require that the rule of responsibility should be different when the publication complained of is not an editorial nor an anonymous communication, but on the contrary contains the name and residence of the writer. In this last case the same degree of liability can not with propriety be exacted from the proprietor of a newspaper. If the same responsibility were enforced in both cases it would, in my judgment, amount to a complete stoppage to all such publishing enterprises, and I believe it to be the true spirit of our institutions rather to encourage than prevent their existence. I consider the true rule to be that malice will be presumed in relation to publications which are proven to be defamatory and false, whether these publications are either editorials or anonymous communications, but there exists no such legal presumption of malice when the publication is one in the nature of an advertisement, the verity of which is vouched for by the signature and residence of the party asking its publication. In such a case, many of the reasons

which vindicate the rules presuming malice in the other exists, and it would be senseless to apply rules when the reasons for their existence have ceased. Therefore you will decide as to the proper character of the publication complained of, whether it is an editorial or an anonymous communication; you will then consider whether the averments thereof have been proved to be defamatory and false. If you are satisfied that it is an editorial or an anonymous communication and that its averments are defamatory and false, then you may infer that it was maliciously published, and you will give a verdict in favor of the plaintiff for such damages as in your opinion will compensate the wrong committed, and serve as a punishment to the defendant for his offense.

“In this case you may take into consideration whether the publication was made with the knowledge of the defendant, and if by his servants, whether in so doing they were acting within the scope of the duties confided to them to serve as guides in the discharge of those duties. The defendant can not be held responsible for vindictive damages if it be shown that the same was made by his employes against his wishes, and in violation of his express orders. If, on the contrary, you conclude that the publication was merely an advertisement, then you can not infer malice on the part of the defendant, simply from the fact that the advertisement is both defamatory and false. In the case of an advertisement signed by parties who gave their residence, it is the duty of the plaintiff to prove malice, and unless he does he can not recover damages. The distinction between an editorial and an advertisement constitutes the reason for the difference of liability in the two cases. In the first the charge, if defamatory and false, comes from the proprietor himself; he vouches upon his own responsibility for the truth of the publication, and should be held strictly accountable if the publication turn out to be false and defamatory. But in the case of an advertisement bearing the signature and residence of the party who wishes its publication, the proprietor can not be said to vouch for the truth of the averments or charges in the publication. Nobody in the community would believe the charge to be true, because they knew the proprietor of the paper to be a responsible man; in such a case the public would look to the character of the author of the publication to believe or disbelieve the charge. If the parties signing the advertisement are shown to be men who were known to the proprietor of the paper, and known by him to be entitled to no credit, or if the circumstances existing at the time were such that an ordinary prudent man ought to have made inquiries, then the proprietor could not claim the benefit of being presumed without malice. But if the circumstances under which the advertisement was inserted were the usual ones in such cases, and that there

was nothing in existence at the time to excite the suspicion of a prudent man, then the publication is free from the presumption of malice however defamatory and false it may have been. No damages can be awarded by you unless the plaintiff has shown malice outside of the publication itself."

We think the instruction given to the jury erroneous in several important particulars, and therefore that the exception was well taken.

We regard the doctrine as no longer controverted that the publication of any communication, with or without the name of the author, which is defamatory and false, subjects the publisher as well as the author to damages in favor of the party aggrieved. Circumstances may be shown in mitigation of damages. The law looks to the *animus* of the publisher in permitting his columns to be used as a vehicle for the dissemination of calumny, whereby the fair character of an individual may be blasted and his business pursuits ruined. In such a case it is not incumbent upon the party assailed by falsehood and defamation to show malice against himself on the part of the publisher, nor to prove that he has received injury by the publication. The law implies malice in the publisher from the act of publishing the libel; not malice in the sense of spite, antipathy or hatred towards the party assailed, but the evil disposition, the *malus animus* which induced him wantonly, recklessly or negligently, in disregard of the rights of others, to aid the slanderer in his work of defamation by the potent enginery of the public press, written or printed slander being justly considered more pernicious than that uttered by words only. Neither does the law regard the injury inflicted as being repaired by the subsequent retraction or apology of the publisher, however promptly it may be made, for it is quite reasonable to infer that many may have read the libel who never saw or heard of its disavowal. Nor is the proprietor of a newspaper exonerated from responsibility because the libelous matter appearing in his paper was inserted without his knowledge or approbation, or even against his wishes. He is responsible in damages for the acts of his agents and employes. To the party affected by the slander the injury is the same, whether the publication was made with or without the consent of the proprietor. The agent or employe may be an irresponsible person.

In the case of *Dole v. Lyon*, 10 Johnson's Reports, Chancellor Kent said: "Individual character must be protected, or social happiness and domestic peace are destroyed. It is not sufficient that the printer by naming the author gives the party grieved an action against him. This reason of the rule is mentioned in Lord Northampton's case, and repeated by Lord Kenyon. But this remedy may afford no consolation and no relief to the injured party. The author may be some vagrant individual who may easily elude process, and if found he may be

without property to remunerate in damages. It would be no check on a libelous printer who can spread the calumny with ease and with rapidity throughout the community. The calumny of the author would fall harmless to the ground without the aid of the printer. The injury is inflicted by the press which, like other powerful engines, is mighty for mischief as well as for good."

In the case of *Huff v. Bennett*, 4 Sandford's Reports 130, it was urged on the part of the defendant, admitted to be the publisher of the *Herald*, who was sued for the publication of several alleged libels, that there was no evidence that he had actual personal knowledge of the publication of the article in question. The court said: "This was an immaterial point. The defendant as the proprietor of the paper was responsible for whatever appeared in its columns, and it was unnecessary to show that he knew of the publication or authorized it. This point is well established."

"In an action for a libel against the printer of a newspaper, it is not a justification that the publication was made at the instance of a person whose name was given at the time, and who paid for it in the usual course of business, though it may go in mitigation of damages." 2 Starkie 471, note; 3 Yeates 518; 3 Wash. 246; 1 Bouney 90; 3 An. 69.

The case of *Tresca v. Maddox*, 11 An. 206, was an action against the proprietor of a newspaper for damages for a libel. One of the employes of the defendant, at that time the proprietor of the *Crescent* newspaper, and, as it seems, without the knowledge of the proprietor, published an exaggerated and inflammatory article, in which the plaintiff was called a pirate. The answer admitted that the charge was false—that defendant had been misled by certain police reports—that instantly on discovery of the error, he had retracted it publicly in his newspaper, with which plaintiff had expressed himself satisfied. The defendant denied that there was malice in the act of publishing the statement. The jury awarded a verdict in favor of the plaintiff for \$1000 damages, which was affirmed on appeal. This court said in that case: "No express malice was proved. Indeed it may be assumed that the defendant, when he made the publication, did not know who Captain Tresca was, and therefore could have had no special malice against him. But in actions of this character malice is often implied. At common law, if the words spoken or published are actionable (as if they import an accusation of an indictable offense), malicious intent is an inference of law, and therefore needs no proof. 2 Greenleaf Ev. section 418 (4). In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others. We think the jury might properly have inferred such malice under the circumstances of the case. 3 La. 208.

The reparation made by recanting the charges the day after they were made was proper to be considered by the jury in estimating the amount of damages; but could not, as the appellant contends, exonerate him entirely. The injury had been done. *Vox semel emissa nunquam revertit*. The slander circulated by one issue of the paper, could not be wholly obliterated by the recantation in another. All who saw the first may not have seen the last. And it is difficult wholly to restore a reputation thus positively and publicly accused of the highest crimes known to the law." It is urged that the plaintiff is debarred from a recovery by the expression of his satisfaction at the apology and retraction published by the defendant. A bargain of this kind could be enforced under our law as it is competent for the injured party to release his claim for damages. But it must appear that he has released it, or expressly agreed to waive his action for the consideration named."

In regard to malice, the rule is, that it need not be expressly proved but will be implied if the charge be false. "Malice is an imputation of law from the false and injurious nature of the charge, and differs from actual malice or ill will towards the individual, frequently given in evidence to enhance the damages." 4 Wendell.

On the question of damages recoverable in cases of libel, the doctrine is well settled that: "Actions of slander may be maintained without proving damages, and the party may recover. This doctrine was recognized by this court after a very full argument in the well considered case of *Miller v. Holstein*, 16 L. R. 389. It was there determined that the courts of Louisiana are not bound by the technical and artificial rules of the common law in slander, but where our law is silent we may resort to a foreign system for a rule consonant to reason and equity. In that case it was announced that the court was not prepared to adopt the common law distinction between words actionable in themselves and words which are not so, and to say a plaintiff is not entitled to recover in an action of slander unless charged with an indictable offense, without proof of special damages." And accordingly it sustained that part of the charge given to the jury in that case which instructed them that "the [slanderous] words were to be understood in their common and popular meaning, and if they charged the plaintiff falsely and maliciously with moral turpitude, so as to injure his character and standing in society, they might find for the plaintiff, without showing any special damage."

"In an action of libel, proof of damages from the publication is not necessary to recover. The actual pecuniary damage in such actions can rarely be proved, and is never the sole rule of assessment." 3 An. 69; 11 An. 206.

"In actions of slander plaintiff may recover, though he show no

special damage. The jury have no fixed rule in assessing damages, and may take into consideration the trouble incurred in seeking relief." 14 La. 198. See 15 An. 166 and 3 La. 207; 2 Rob. 365; 5 Rob. 116 and 8 Rob. 51.

By a statute of this State, enacted in 1855, the truth of the slanderous, defamatory or libelous words or matter, for the uttering or publishing of which a party is sued, may be pleaded in justification; and if it shall appear that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted. Revised Statutes 706, sections 3640 and 3641.

We shall now proceed to inquire how far these principles and rules of the law of libel, collated from various authorities are applicable to the facts presented in this case. About nine o'clock at night three or four men came into the defendant's office much excited, and one of them, at least, in a state of intoxication. They complained of an outrage which they said had been committed against them at Carrollton, and wanted to publish a card in relation to it. They showed the card to the managing editor, who advised them not to publish it. They replied that if the card had been brought in by wealthy people, better dressed than they were, there would have been no objection; but, because they appeared to be poor men their card was refused. The editor finally directed the employe having charge of the advertising department to receive their card, and take their names and residences. The spokesman of the party was under the influence of liquor. The advertising editor proposed to alter the phraseology of the card, which he considered ridiculous, but this was vehemently objected to by the parties, who displayed a dictatorial manner, demanding the insertion of the card as it was presented, and this was finally assented to. These men were entire strangers to the employes of the office, were coarse in their manners, and they demanded peremptorily the publication of an article couched in language indicating that their ignorance was in keeping with their effrontery. The next morning, soon after the article appeared in the paper, the plaintiff went to the defendant's office to complain of the publication. The proprietor of the paper had known nothing of the matter. In conjunction with the plaintiff he used active measures to find the parties who had caused the publication to be made; but after strict search through the aid of police officers, not one of them was ever found. Every thing in relation to them appeared fictitious and mythical. One of them signed the card giving his residence No. 413 Frenchmen street. The numbering on the houses in Frenchmen street, it was found did not run as high as 413, and there was no tenement of any kind in that street having that number. Suit was instituted by the plaintiff against all the parties and by the returns of the sheriff it appeared they were not to be found

after due and diligent search and inquiry had been made. It turned out that late in the day, previous and a few hours before they appeared in the defendant's office to demand the publication of their card, they had been arrested in Carrollton for disorderly conduct, and taken before the plaintiff, a justice of the peace, who had imposed upon one of them a fine of five dollars.

The defendant avers in his answer that when complaint was made to him by the plaintiff, that the advertisement was false and injurious to him, he caused to be inserted in an editorial article in the "Times" newspaper an explanation, which the plaintiff accepted as satisfactory, and in vindication of himself. This editorial is in these words: "An advertisement appeared in the Times yesterday in which Judge Perret, of Jefferson, and the police officers of Carrollton, are charged with certain very improper conduct toward five persons, whose names were attached to the advertisement. We are assured by Judge Perret that there is not a word of truth in this card—that he and the police officers of Carrollton were engaged in the performance of their duties in preserving peace and order in the cars, where the advertisers were creating a disturbance, and violating the ordinances of the city and the laws of the State. If Judge Perret's statements are correct, the advertisers in question have assumed a responsibility by their publication which they have no right to expect us to share with them."

The plaintiff, by the publication in question, is charged with complicity in the commission of a high crime. The terms used admit of no other construction. This charge is shown to be false and defamatory. Malice is, therefore, implied as arising from the needless and reckless publication of the advertisement, in wanton disregard of the rights of others. The facts certainly show the culpable want of a prudent respect for the character and feelings of others which should be shielded from falsehood and detamation. On the first presentation of the libelous card, the managing editor, as he states himself, advised the parties not to have it published. This clearly shows that he saw the impropriety of its publication, and yet he yielded to the importunities of those men, and permitted its insertion, an act which his first impression and better judgment did not approve. In the defense of this case much has been said of the liberty of the press, and of the right of persons to make known to the public their wrongs and grievances, and it is asserted as a duty to publish pleas addressed to public opinion, asking that justice be rendered, and a wrong like that complained of by the parties, who presented their card to the defendant, be condemned by the popular censure and disfavor. The press is set up as a tribunal for the redress of wrongs. The liberty of the press, we concede, is the palladium of civil liberty. It is one of the essentials of a free government. It is a sacred right secured by our organic

law; but with the grant of the right is imposed the obligation to refrain from its abuse. Public journalists, like everybody else, are held to an observance of the proprieties of social life. While the utmost latitude is accorded to them in the discussion of all subjects, and they may freely comment upon the acts and conduct of men as individuals, to say nothing of the wide expanse of authority to speak faithfully and boldly in the interests of the people regarding public measures and questions of all kinds that concern the community at large, still there is a limit beyond which this freedom becomes license. It is upon the confines of these that responsibility begins. The law which shields the private character and reputation of an inoffensive person from the assaults of calumny and falsehood, is founded upon a public sentiment of greater power even than that of the free press. It forbids the wanton violation of the sacredness of personal character and good name. In this case no public need required the publication of the offensive card. No public interest was subserved by it. No private wrong was redressed by it, and no good reason existed to suppose there would be. But as the result shows, a wrong was inflicted. A man of respectable character and good report in the community, was falsely charged with the crime of robbery; and the charge went forth to the world in the column of a newspaper having an extensive circulation.

The defendant alleges that no injury could result to the plaintiff by the publication complained of, and sets up reparation made by the editorial article he caused to be inserted in the Times, and which he avers the plaintiff accepted as a satisfactory explanation. The plaintiff may have been damaged in character and standing in society, and yet be unable to establish it by proof. But we have seen from the authorities already referred to that in actions of libel proof of damages is not necessary to enable the party to recover. 3 An. 69, 11 An. 206. The allegation that the plaintiff accepted the editorial article as satisfaction is not sustained by the evidence. The terms of the article do not import an acknowledgment of the falsity of the charge made in the card against the plaintiff. On the contrary they are vague and hypothetical. But the defendant relies principally upon the position that having, at the time the publication was made, reason to believe the statement of the parties signing the card was true, no malice can be inferred against him, and he relies upon the case of *Bodnell v. Osgood*, 3 Pickering's Reports, 384, where it is laid down that "the deliberate publication of a calumny when the publisher knows it to be false, or has no reason to believe it to be true, is conclusive evidence of malice."

We have already shown that in a case like the one at bar, the malice implied where the charge is false is not malice in the sense of hatred

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or spite towards an individual. It is the act of publishing to the world matter which is false and defamatory. It is the doing of this act with utter disregard to the effect it may have upon the rights, the character, the feelings and the interests of the individual traduced. Conduct of that kind is reprehensible in morals and is held culpable in law. The belief at the time of publishing the falsehood that it was true can only go according to circumstances in mitigation of the offense, and not to exculpate the party. Upon the defendant's doctrine even, we should, in view of all the facts shown in this case, hesitate to conclude that he had good reason to believe the charge against the plaintiff to be true.

This case bears a close resemblance in most respects to that of *Tresca v. Maddox*, 11 An. 206, which we have adverted to. The case now before us, however, is a stronger one against the defendant.

The evidence in the record is full and clear and enables us to do justice between the parties. We are satisfied from a careful consideration of all the facts that the plaintiff has made out a case which entitles him to damages, and we think the amount should be fixed at five thousand dollars.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff, L. Charles Perret, recover from Charles A. Weed, proprietor of the newspaper styled "The New Orleans Times," the sum of five thousand dollars, with interest thereon at five per centum per annum from judicial demand, and all costs of suit.

Justice Wyly being absent took no part in this decision.

No. 4568.

SAMUEL FISHER, Guardian, v. F. D. TUNNARD.

There is no law which directs a book to be kept in the Parish Recorders' offices for the recording of tutors' bonds, and this court is not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of a minor's mortgage, where in the same office are kept the books in which the law directs mortgages to be inscribed.

It has been frequently held that in the country parishes the registry of a mortgage in the conveyance book in which all mortgages and privileges are recorded, is sufficient, if separate books be not kept; but if there be a separate registry of mortgages, the mortgage must be inscribed in it.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. S. P. Greves*, for plaintiff and appellant. *Fuqua & Callihan*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

TALIAFERRO, J. W. F. Tunnard was appointed tutor to Lucy M. Phillips in 1855. His bond as tutor was recorded sixteenth of July,

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1855, in Book A of Bonds, in the recorder's office. The tutor's final account was homologated on the twenty-first of July, 1865. The judgment of homologation authorized the tutor to execute a mortgage on a certain house and lot in Baton Rouge as additional security. This judgment was recorded in Book of Judicial Mortgages on the twenty-eighth of July, 1865. The special mortgage as additional security was recorded, but the date of the recording is not shown.

Two creditors of Tunnard, the tutor, obtained judgments against him, which were recorded on the twenty-second of July, 1865. Executions were issued on these judgments, and the property specially mortgaged by Tunnard as additional security in favor of the minor, was seized and sold, and the defendant, in this case, became the purchaser. On the decease of W. F. Tunnard, the first tutor of the minor, the plaintiff, Fisher, became her guardian, receiving the appointment in Warsaw county, State of New York. He brings this hypothecary action to enforce the minor's mortgage against the property mortgaged by the former tutor as additional security for the tutorship. He alleges that the former tutor qualified in that capacity in 1855, by giving bond according to law, "which bond was duly recorded in the recorder's office of said parish in the book specially provided for the recording of tutors' bonds, in order to create a mortgage upon the real estate of tutors, and according to law."

The defendant denies that the bond of Tunnard, as tutor, was ever recorded in the mortgage records of the parish in conformity with law. He further contends that the judgments under which the property was sold, having been recorded prior to the recording of the judgment homologating the account of the tutor, Tunnard, the judicial mortgages resulting therefrom, take precedence of that of the minor's judgment. Judgment was rendered in favor of the defendant, and the plaintiff has appealed. The prominent question in the case is, did the recording of the tutor's bond in 1855 in the 'Book of Bonds' fulfill the requirements of law in regard to the recording of acts which are to operate as notice to the world of the existence of mortgages?

We have not been directed to any law, and we have found none, which directs a book to be kept in the recorders' offices for the recording of tutors' bonds. We are not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of the minor's mortgage, where, in the same office, are kept the books in which the law directs mortgages to be inscribed. C. C. 3388, 3390.

. It is shown that in the recorder's office of East Baton Rouge, separate books are kept for recording the different kinds of mortgages. "A legal registry alone gives effect to the mortgage against third per-

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sons, as to whom it is valid, not as executed, between the parties, but as recorded " 2 An. 917. It has been frequently held that in the country parishes the registry of a mortgage in the conveyance book in which all mortgages and privileges are recorded is sufficient if separate books be not kept; but if there be a separate registry of mortgages, the mortgage must be inscribed in it. 2 An. 438, 800; 5 An. 154; 6 An. 162; 2 An. 251. We are not prepared to say there is error in the decision of the lower court.

It is therefore ordered that the judgment of the district court be affirmed with costs.

No. 4493.

DOREINO LANDRY, Curator, v. DELAS, LORIO & Co. and als.

The plea of payment admits the existence of the debt, whose continuance will be presumed unless the defendant makes good his plea.

An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the terms of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents which do not come within the purview of their powers, and which are therefore not regarded as binding on their principals. Therefore the defendants' plea in this case that they are not bound as sureties on the notes sued upon, for the reason that the plaintiff gave an extension of time to the principals without their knowledge and consent, is not well founded.

APPEAL from the Third (now the Fifteenth) Judicial District Court, parish of Lafourche. *Thomas P. Sherburne*, acting Judge in the place of the District Judge, recused. *Nicholls & Leblanc*, for plaintiff and appellant. *O. Knobloch, Belcher and Louis Bush*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

TALIAFERRO, J. Two suits under this title, between the same parties, were consolidated and tried together in the court below. Delas, Lorio & Co., in July, 1860, bought at the succession sale of Jean Coutade, deceased, a lot of ground with several buildings upon it in the town of Thibodaux, and a large lot of merchandise. The lot of ground with the buildings and improvements upon it was sold on a credit of one and two years. Four promissory notes, each for the sum of \$1525, were executed by the purchasers for the payment of the price. Two of the notes were made payable in all the month of March, 1861, and the other two in all the month of March, 1862. The purchasers gave three sureties on these notes who were bound *in solido* with the principals. For the payment of the price of the merchandise the purchasers, with the same sureties, executed *in solido* a promissory note for \$10,300, payable in all the month of March, 1861. The notes stipulate interest at eight per cent. per annum from their respective maturities. The principals having failed in business and taken the

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benefit of the insolvent laws, are lost sight of in these suits, the object of the curator, the plaintiff in the suit, being to enforce payment of the notes against the sureties.

The defendants answer that they are not bound on the notes, for the reason that the plaintiff gave an extension of time to the principals without their knowledge and consent. They further plead payment and claim the benefit of division and discussion.

Judgment was rendered in favor of the defendants and the plaintiff has appealed.

The defendants' pleas are inconsistent. The plea of payment admits the existence of the debt, whose continuance will be presumed unless defendants make good their plea. 3 N. S. 273; 12 La. 397; 14 An. 54. An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the term of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents which do not come within the purview of their powers, and which are, therefore, not regarded as binding on their principals. We think the judgment erroneous, and that the plaintiff is entitled to have judgment in his favor on the notes sued upon, subject to the several credits we think the defendants have established. There are various bills of exceptions in the record. The third, fifth and eighth relate to admissibility of the testimony of Delas, Lorio and Coyne to establish payments. We think the objections without weight. The defendants had certainly the right to establish the payments they made, and we think they have legally done so. The other bills of exceptions need not be passed upon for the purpose of deciding the case.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendants *in solido* the following sums with interest, subject to the several credits herein below specified, to wit: Fifteen hundred and twenty-five dollars, with interest at eight per cent. per annum from the first of April, A. D. 1861; the like sum with like rate of interest from the same date; the like sum with like rate of interest from the first of April, A. D. 1862; the like sum with like rate of interest from the same date, first of April, 1862, and also the further sum of ten thousand three hundred dollars, with eight per cent. interest thereon from the first day of April, 1861; the whole subject to the following credits, viz: The sum of four hundred and eighty dollars, to date and have effect on the tenth of June, 1862; the sum of seven hundred and sixty-seven dollars and nineteen cents, to take effect from the thirteenth of August, A. D. 1861; the sum of six hundred and fifty-one dollars and thirty-seven cents, to date and have effect from the thirty-first of August, 1862; the sum of

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seventy-six dollars and forty-six cents, to date and have effect from the first of September, A. D. 1865; the sum of two hundred and seventy-five dollars and eighteen cents, to date and take effect from the first of February, A. D. 1866; and the further sum of three thousand six hundred and sixty-five dollars, to date and take effect from the nineteenth of June, A. D. 1867. It is further ordered that defendants pay costs in both courts.

4492.

SUCCESSION OF JEAN BAPTISTE LANDRY AND M. TRAHAN, his wife, DORCINO LANDRY, and als v. EUGENE PERAY, Tutor, for a Partition.

25	183
48	971
25	188
108	274

Where a note for a certain sum of money was found in the succession of the father of the maker's wife, and was alleged to have been given in acknowledgment of an *avancement d'hoirie* to said wife, who subsequently died, leaving minors for her heirs;

Held—That said note being given in the individual name of the maker must be considered as his individual debt, and is not subject to colation on the part of the minors in the succession of their grandfather, and that, even admitting said note to have been an acknowledgment of indebtedness by the drawer in the name of his children, a tutor has no right to make such an acknowledgment.

A PPEAL from the Parish Court, parish of Assumption. *A. P. Lauve*, judge *ad hoc*, in place of the parish judge, recusing himself. *R. N. Sims*, for appellee. *Nichols & False, Hiram H. Carrer*, for appellants.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

MORGAN. J. The only question in this case is whether a note for \$8375 06, found in the succession of Jean Baptiste Landry, dated seventeenth September, 1861, and signed by Eugene Peray, is to be colated as an "*avancement d'hoirie*" to the maker's wife during her life time, or whether it is an individual debt of the maker.

Mrs. Peray was the daughter of J. B. Landry. She died before her father, leaving minor children. Her father was in the habit of making advances to his children in anticipation of their rights in his succession. The note which it is alleged is subject to colation was given in the individual name of Peray, and must be considered as his individual debt. It is not signed by him as tutor to his children, and if it had been it would not have been binding upon his children. It was not an acknowledgment of indebtedness on the part of the children. The tutor has no right to make such an acknowledgment.

Admitting that the money which is represented by the note was given by Landry to his daughter, and was a debt due by her to him, when her father, after her death, took her husband's note for the debt, he novated it by taking another obligee therefor. The note forms a part of his succession, but it is not an obligation which the mother's children are responsible for.

Judgment affirmed.

Broadus, Bettis & Co. v. Nolley, Andrews et als.

No. 4583.

BROADDUS, BETTIS & CO. v. NOLLEY, ANDREWS et als.

It is no defense to a suit to plead that the plaintiff had said to the defendant that he would discontinue his suit if some other creditor would do the same. Such a promise would neither discharge the debt nor bar the action, because an agreement without consideration is not obligatory.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Thomas P. Farrar*, for plaintiffs and appellants. *Wells & Rainey* and *E. D. Farrar*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiffs appeal from the judgment rejecting their demand against the defendants, the sureties on the bond to release the property sequestered in the case of the plaintiffs against Neely & Herrin, No. 681, on the docket of the district court, parish of Madison.

The defense is, that at the time of the sequestration, the property (the cotton) of Neely & Herrin was under provisional seizure to pay the rent of the place on which it was raised; it was released on bond in both cases, the defendants being the securities on said bonds; that J. C. Bettis, of plaintiffs' firm, stated to Andrews, of defendants' firm, that he was forced to sequester on account of the said provisional seizure, and that if he would induce the plaintiff in the provisional seizure case to dismiss or withdraw his suit, that Broadus, Bettis & Co., would do the same; that Andrews accordingly paid the plaintiff in the provisional seizure case, and his suit was dismissed, and he notified Bettis thereof, who again consented to dismiss his suit; that nothing was done at the fall term of 1870 on account of this agreement; that in February, 1872, the plaintiffs in the case against Neely & Herrin caused judgment to be entered contrary to and in utter violation of said agreement.

This defense is supported by the testimony of Andrews and Neely, and it is flatly contradicted by Bettis, who swears he never made any agreement with Neely or Andrews in regard to the sequestration suit; that "as for making any agreement to take Neely for the debt and releasing Andrews and others on the bond, when I knew he was insolvent, would have been absurd." The statements of Andrews and Neely are highly improbable, because no prudent man having his debt secured by the bond would consent without consideration to dismiss his suit and look for payment to an insolvent. But assuming the truth of testimony of Andrews and Neely, we are of opinion that the defense must fail. It is no defense to a suit to plead that the plaintiff had said to the defendant he would discontinue his suit if some other creditor would do the same. Such a promise would neither discharge

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the debt nor bar the action, because an agreement without consideration is not obligatory.

The defendants, the sureties upon the release bond, do not pretend that the judgment against their principals is not correct, nor do they deny their suretyship.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that the plaintiffs recover judgment against the defendants, *in solido*, for sixteen hundred and seventy-four dollars and seventy-three cents, with five per cent. per annum interest thereon from fifteenth November, 1870, subject to a credit of six hundred and sixty-five dollars and fifty-three cents, on the fifteenth of January, 1871. It is further ordered that plaintiffs have judgment against the defendants for one hundred dollars, the amount of costs of said suit against Neely and Herrin, and that they pay costs of this suit.

No. 3796.

NORTHERN BANK OF KENTUCKY and als. v. THE POLICE JURY OF
POINTE COUPEE and als.

Where in a suit to erase the mortgage of a third party, said party alleged that the mortgaged property had never been individually owned by the debtor of the plaintiffs, and that, even if it had been the property of said debtor, which was expressly denied, the mortgage was binding and operative, and that no valid reason existed in law to have it canceled ;

Held—That the two pleas were not contradictory, and that the judge *a quo* erred in ruling defendant to elect between them, because it was competent for the party to prove that the property seized not belonging to the debtor of the plaintiffs, they had no right or interest to inquire into the validity of the mortgage resting on it ; and because it was also competent for said third party to establish at the same time that the mortgage in his favor was valid.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Miller, J. Edward Phillips*, for plaintiffs and appellees. *Haralson & Claiborne*, for defendants and appellants.

Justices concurring : Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. The plaintiffs having a judgment against Jules Labatut, caused a plantation, situated in Pointe Coupée to be seized, under an execution issued under said judgment, as the property of said Labatut. The plaintiffs then instituted this suit to erase a mortgage executed by Labatut in favor of the Police Jury of Pointe Coupée for the benefit of the Poydras College, for the sum of \$23,166 60, on the ground that it had no legal existence.

The defendants in their answers allege that the property "is and always has been the property of Zenon Porche's succession, administered by Jules Labatut, dative testamentary executor of the will of Z. Porche, in which capacity alone has he now or has he ever had posses-

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sion of said mortgaged property. They further alleged that if the property be "held to be that of Jules Labatut, and susceptible of mortgage by him individually, which is alleged by said plaintiffs, but which they (defendants) expressly deny, then they aver that said mortgage is binding and operative on the property mortgaged, and that no good and valid reason exists in law why the same should be canceled or set aside."

The plaintiffs then moved that the defendants be compelled to elect which of the two pleas they would rely upon, on the ground that they were contradictory. The court ordered that the pleas were contradictory, and that the defendants should elect between the two. The defendants took a bill of exceptions to this ruling, and they elected to rely upon the defense that the property belonged to the succession of Porche and not the debtor of the plaintiffs.

On the trial the defendants offered testimony and documentary evidence to prove that the property, seized and claimed by plaintiffs to belong to Labatut, belonged to the succession of Porche as alleged in their answers, which succession was in course of administration in the parish court, and that the defendants were particular legatees under the will for the amount for which the mortgage had been executed; that their legacy was unproved and that there was no other property of the succession out of which said legacy could be discharged, to the introduction of which evidence the plaintiffs excepted on the ground that the evidence was irrelevant, in this that if the property belonged to the succession, the cancellation of the mortgage could not affect injuriously the succession, and because the defendants having elected to claim as legatees under the will and not under the mortgage, had no interest in opposing its erasure. The court sustained the objections and rejected the evidence. The defendants retained their bill of exceptions.

It thus appears, that in a suit to erase a mortgage of a third party, that party is forced to elect between two defenses against the action of the plaintiffs, on the ground that they are inconsistent; and that having elected the first they are then not allowed to establish it, because it is not material to the issue presented by the plaintiffs.

We are of the opinion that the defenses set up were not contradictory. It was competent to prove that the property, seized as the property of Labatut, did not belong to him, to show that the plaintiffs, creditors of Labatut, had no right or interest to inquire into the validity of defendants' mortgage on said property, and they might at the same time have shown that the mortgage was valid. The property was held by the testamentary executor and the property was in course of administration in the probate court. The executor was also the universal legatee, and he gave the mortgage in question to secure the

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payment of the special legacy in favor of the Poydras College. We do not consider the defenses inconsistent or contradictory; and the rulings of the judge *a quo* were erroneous in forcing the defendants to abandon one of their grounds of defense, and in refusing to allow them to prove that the property belonged to the succession of Z. Porche.

It is therefore ordered and adjudged that the judgment of the lower court canceling the mortgage in favor of the Police Jury of Pointe Coupée for the benefit of the Poydras College be annulled, and that this case be remanded to the court *a quo* to be proceeded with according to law. It is further ordered that the plaintiffs and appellees pay costs of appeal.

No. 2540.

ADAM TATE v. LAFOREST & DESMARE.

Where defendants received a certain quantity of cotton, sold it, and collected the proceeds of the sale as commission merchants or factors of the plaintiff;

Held—That the debt resulting from it is a fiduciary one and exempted by the insolvent law from its operation. The money was received in trust for the plaintiff. Defendants, by converting it to their own use, rendered themselves amenable to the criminal laws of the State. It cannot, therefore, be inferred that the insolvent laws of the State intended to discharge a debtor from such a debt, even if it had not been therein expressly excepted.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Randolph, Singleton & Browne*, for plaintiff and appellee. *A. Pitot*, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro, Wyly, Morgan.

LUDELING, C. J. The plaintiff sues to recover \$2754 83, the net proceeds of cotton shipped by them to the defendants, as factors and commission merchants.

The defendants admit the correctness of the debt, but they claim that they have been discharged from the obligation to pay it by proceedings in insolvency.

On behalf of the plaintiff it is contended that the proceedings, as to the plaintiff, are null and void for want of citation, and that the debt was created in a fiduciary capacity, and that the insolvents were not released from such a debt.

The evidence satisfies us that Laforest & Desmare received the cotton as the commission merchants or factors of the plaintiff, and as such, sold the cotton and received the proceeds of the sale. The debt is, therefore, a fiduciary debt, and the insolvent law exempted such a debt from its operation. The defendants received the money for account of the plaintiff and held it in trust for them. By converting it to their use, they rendered themselves amenable to the criminal laws

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of the State. It could not therefore be inferred, that the insolvent laws of the State intended to discharge a debtor from such a debt, even if it had not been expressly excepted in the law. The benefit of the insolvent laws is intended for the honest, but unfortunate debtor. 4 La. 55; 1 M. 159.

We think the judgment in favor of the plaintiff for the sum claimed is correct.

It is therefore ordered and adjudged, that the judgment of the lower court be affirmed with costs of appeal.

No. 4526.

WILLIAM WALSH v. CHARLES LALLANDE.

Where parties claim title to lands acquired from the United States, after the General Government has parted with its title, the courts will decide their rights under the law, without reference to the action of the officers of the land office.

A citizen, in its largest sense, is any native born or naturalized person, who is entitled to full protection in the exercise and enjoyment of the so called private rights.

By the laws of Louisiana native born free persons of color were in the full enjoyment of those rights in 1844.

By the treaty whereby Louisiana was acquired, the free colored inhabitants of Louisiana were admitted to a citizenship of the United States;

Therefore, a free colored person who was born in Louisiana, who had always lived there, and whose ancestors for two generations before him had been free and had lived in Louisiana, was a citizen of that State in 1860, at the epoch when the commissioner of the general land office, in an *ex parte* proceeding, canceled an entry made by said person under the pre-emption laws of 1841, on the thirty-first day of December, 1844, on the ground that said person, being a *free negro*, was not a citizen of the United States, although he had remained in possession of the land since the entry and had complied with all the requirements of the laws of the United States to entitle him to enter the land by pre-emption.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Butler, J. Haralson & Claiborne*, for plaintiff and appellee. *Edward Phillips*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Wyly, Morgan.

LUDELING, C. J. This is a petitory action for a tract of land situated in the parish of Pointe Coupée. The plaintiff claims under a patent from the State of Louisiana, dated on the twenty-first of February, 1861.

The defendant claims under an entry made under the pre-emption laws of 1841, on the thirty-first day of December, 1844. The defendant has been in quiet possession of the property since his settlement in 1844 until 1866.

It appears that in an *ex parte* proceeding the commissioner of the general land office ordered the cancellation of Lallande's entry on the fourteenth of November, 1860, on the ground that he was a *free negro*,

and the plaintiff was permitted to locate a school warrant on the land, which has been approved by the Secretary of the Interior. Thus it appears that the United States has parted with its title. Where parties claim title to lands acquired from the United States after the general government has parted with its title, the courts will decide their rights under the law, without reference to the action of the officers of the land office. 20 An. 435; 20 How. 7, *Garland v. Winn*; 1 Peters 212, *Comegys v. Vosse*; 14 How. *Cunningham v. Ashley*; 14 An. 134. The legal question, upon which the commissioner seems to have predicated his decision, is, whether Lallande, the defendant, was a citizen of the United States, and he held that he was not, because he was a *free negro*.

The agreed statement of facts in this record shows that Charles Lallande was born of free parents, in this State, and he is of mixed blood. His grandfather was a white man, a Spaniard; his grandmother was an Indian. Their issue was the father of the defendant, the defendant's mother was a mulattress. All were born free and were inhabitants of Louisiana. The other facts agreed to show that Lallande complied with the requirements of the laws of the United States to entitle him to enter the land by pre-emption; was a free colored person, who was born in Louisiana, who had always lived there, and whose ancestors for two generations before him had been free and had lived in Louisiana, a citizen of Louisiana? A citizen in its largest sense is any native born or naturalized person who is entitled to full protection in the exercise and enjoyment of the so called private rights.

By the laws of Louisiana native born free persons of color were in the full enjoyment of those rights in 1844. All free native born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. Opinion of Justice Curtis in *Dred Scott*.

By the treaty whereby Louisiana was acquired, the free colored inhabitants of Louisiana were admitted to citizenship of the United States.

In the case of the *State v. Manuel* (4 Dev. and Bat. 20), Judge Gaston, as the organ of the court, said: "According to the laws of this State, all human beings within it, who are not slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our revolution, all free persons born within the dominions of the king of Great Britain, whatever their color or com-

plexion, were native born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British king. Upon the revolution, no change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European king, to a free and sovereign State. Slaves remained slaves—British subjects in North Carolina became freemen. Foreigners, until made members of a State, remained aliens. Slaves, manumitted here, became freemen, and therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. The constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one, and paid a public tax; and it is a matter of universal notoriety, that, under it, free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color a few years since by our amended constitution.”

The reasoning in that case is *a propos* in this.

The judge *a quo* referred to the decision of the Supreme Court in the Dred Scott case. That case is inapplicable. In that case the opinion announced was that “a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as negro slaves, was not a citizen.” At any rate, it is but a single case and does not settle the question. We think the facts of this case justify us in saying that Lallande was a citizen of Louisiana at the time he acquired the land in question; that he had the capacity to acquire it, and he has the better right to the land.

It is therefore ordered and adjudged that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant, decreeing him to be the owner of the lands in dispute, and rejecting the plaintiff's demand with costs of both courts.

No. 4343.

STATE OF LOUISIANA v. JOHN GARVEY AND CHARLES EARLE.

The statements under oath, in a judicial proceeding, made as a party accused and not as a witness, are not to be held as voluntary, and therefore are not admissible as evidence on the trial of said accused party.

Where it was objected to the admission as evidence of a declaration in writing purporting to be a voluntary confession of the accused, on the ground that such a declaration was not voluntary, because it appeared on the trial of the case that it was doubtful whether or not inducements by the Superintendent of the Metropolitan Police had not been offered to the accused to make said declaration, and because under such circumstances, the accused was entitled to the benefit of the doubt;

Held—That the court below erred in overruling the objection.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.*
Criminal case. Trial by jury. *A. A. Atocha*, for appellants.
Simeon Belden, for the State.

Justices concurring: *Ludeling, Taliaferro, Morgan.*

TALIAFERRO, J. The defendants in this case have appealed from a judgment of the First District Court of New Orleans, sentencing them to hard labor in the penitentiary for life, on the verdict of a jury finding them guilty of the crime of murder without capital punishment.

The case comes before this court on two bills of exceptions. The first is to the admission in evidence against the accused, of a declaration in writing purporting to be a voluntary confession by Earle, one of the accused, of the commission of the crime wherewith the parties were charged. The objection is that this declaration was made under oath, Earle being at the time under arrest, and brought before the coroner at the time of holding the inquest over the body of the deceased, by the request of Earle himself to make the said declaration. That the declarations and statements of Earle were given as a party accused and under oath and were not admissible at all.

A clear and well marked distinction is made between the effect of statements made by a party under oath as a witness in a criminal proceeding and the statements under oath by an accused party. In the first case, whatever the witness may state tending to criminate himself in regard to the accusation about which he testifies may be introduced as evidence against him in a subsequent prosecution of himself for the same offense. But it seems to be well settled that the declarations under oath of an accused party are not to be held voluntary and consequently are not admissible in evidence.

Mr. Greenleaf in his treatise on the law of evidence, vol. 1, section 225, in laying down the rule that a party accused must not be sworn, says: "It may at first view appear unreasonable to refuse evidence of confession merely because it was made under oath, thus having in favor of its truth one of the highest sanctions known to the law. But

it is to be observed that none but voluntary confessions are admissible; and that if to the perplexities and embarrassments of the prisoner's situation, are added the danger of perjury, and the dread of additional penalties, the confession can scarcely be regarded as voluntary; but on the contrary, it seems to be made under the very influences which the law is particularly solicitous to avoid." This doctrine appears to be maintained generally by the standard authorities, McNally on Evidence, Roscoe on Criminal Evidence, Russel on Crimes, and others.

In the case of the People v. Hendrickson, the subject underwent a very thorough consideration by the Supreme Court of the State of New York and afterwards by the Court of Appeals of that State. Parker's Criminal Reports, vols. 1 and 2. A review was taken of all the leading English cases, and the few American cases that had then (1852) been reported. Mr. Justice Wright remarked, vol. 1, p. 414: "From this review, I think it must be apparent that it is only when a party accused has been examined on oath that his statements are to be rejected when offered in evidence against him." In passing on Hendrickson's case the Court of Appeals said: "Where the evidence offered has been rejected on the ground that the statement was made when the prisoner was in custody charged with crime, as in Wheeley's case and Owen's case, it seems to me clear that it was properly excluded, because these were cases of the examination of a prisoner not of a witness. In such cases it is a judicial examination, and it should not be on oath and certain precautions, for the protection of the accused are always observed." Vol. 1, p. 420.

In the case of the People v. McMahon, before the same court a few years afterwards, the court remarked: "This subject has been so recently and so fully examined in the case of the People v. Hendrickson, 1 Parker Crim. R. 416, that nothing now can be gleaned from a further review of the authorities. Upon principle there can be no good reason for the exclusion of this evidence. It is only upon a judicial examination, where the prisoner is brought before a magistrate charged with crime, that the accused is to be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him. He is to be examined but not under oath; and his answers may be subsequently used as evidence against him. That is the examination of a party and not of a witness." * * * "Under such circumstances McMahon was not before the coroner as a prisoner but as a witness. It does not appear that any person knew of his arrest but Squyres. In regard to the coroner's proceeding, he stood in no respect in the relation of one arrested or even accused. He was there only in the capacity of a witness and it is as such and not as a party that his legal rights are to be determined." 2 vol. Par. Crim. R. pp. 670 and 671.

State of Louisiana v. Garvey and Earle.

In the case now before this court the judge *a quo*, we apprehend, overlooked the distinction so clearly drawn in the New York cases we have adverted to. Earle was before the coroner as a party accused and not as a witness. He was there in custody as such, a fact within the knowledge of the coroner.

The second bill of exceptions was taken to the admission of the declaration in writing, purporting to be a voluntary confession by Earle, on the ground that such declaration was not voluntary, because the Superintendent of Metropolitan Police, when testifying in the case, said he could not swear that he had not offered inducements to Earle to make the declaration, thereby leaving it in doubt whether or not inducements were offered to Earle to make the declaration, and that the accused was entitled to the benefit of the doubt.

We think the court below erred in overruling the objections made to the admission of the written declaration of Earle as a voluntary confession.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed. It is further ordered that this case be remanded to the court of the first instance for a new trial.

WYLY, J., being absent, took no part in this decree.

No. 2887.

ELIZABETH SOMMERS v. GUSTAVE SCHMIDT.

Where the husband has not appeared with his wife, in the suit instituted by her, the latter must show his authorization. Her own averments, or those of her counsel as to that fact are not sufficient.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Muse & Phillips*, for plaintiff and appellant. *Gustave Schmidt*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. This suit must be dismissed, because it was brought by the plaintiff, a married woman, without the authorization of her husband.

Where the husband has not appeared with his wife, the latter must show his authorization otherwise than in her own averments, or those of her counsel. Succession of Pomroy and authorities there cited. 21 An. 576.

It is therefore ordered that this suit be dismissed at plaintiff's costs.

No. 4565.

JEFFERSON WELLS, Curator, v. J. M. WELLS, Executor.

A mortgage creditor has no right to enjoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a higher rank, or a preference over him.

Where creditors, who were by judgment entitled to be paid by preference, intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so amended as to allow them twenty per cent. damages on their claims ;

Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff who, by enjoining, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted.

APPEAL from the Parish Court, parish of Rapides. *Daigre, J. W. A. Seay*, for plaintiff and appellant. *Manning, Ryan & White*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff appeals from the judgment dissolving the injunction sued out by him as a mortgage creditor, to restrain the sale of the property of the succession represented by the defendant, to satisfy the creditors mentioned on the tableau. The grounds for the injunction were :

First—There is movable property out of which the creditors should be paid, and until it is exhausted the immovable property should not be sold, as was attempted by the defendant.

Second—The plaintiff, a mortgage creditor, has not been notified of the application for the order of sale.

The first point is not sustained by the evidence. In answer to the second it is sufficient to say, that a mortgage creditor has no right to enjoin the sale for want of notice of the application therefor, when the sale was ordered to pay creditors having a higher rank, or a preference over that mortgage creditor. In this succession it has been decided by this court that the debts for the services of attorneys, \$2500, and the commissions of the executor, \$1361 63, being debts of the succession, should be paid by preference over the debts of the deceased. 24 An., Succession of Thomas J. Wells.

When, therefore, the court ordered the sale of property to pay these creditors, whose rights had been determined by this tribunal, the plaintiff was wholly without right to enjoin it. These creditors intervened and joined in the defense; and they pray that the judgment be amended so as to allow them twenty per cent. damages on their claims. They are not entitled to any increase of the amounts allowed them respectively on the tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the

Wells, Curator, v. Wells, Executor.

common debtor, the succession. It is not the fault of the succession that they have not been paid, even if such a delinquency could be the basis for enlarging their pretensions. But the plaintiff, who has illegally obstructed the sale, provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment in that respect should be granted.

It is therefore ordered that the judgment appealed from be affirmed with costs; and it is further ordered that the defendant recover judgment, *in solido*, against the plaintiff and his sureties on the injunction bond, for twenty per cent. damages on twenty-five hundred dollars, and like per cent. on thirteen hundred and sixty-one dollars and sixty-three cents.

No. 4554.

BALL, HUTCHINGS & CO. v. ESTATE OF SHARPLEY OWEN.

The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceeding or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll. *Hough, J. F. F. Montgomery* and *Charles M. Pilcher*, for plaintiffs and appellants. *Sparrow & Montgomery*, for defendant and appellee.

Justices concurring, Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiffs appeal from the judgment rejecting their demand against the defendant on two promissory notes for \$6000 each.

The defense is failure of consideration by reason of the eviction of the defendant of the land, the purchase price of which the notes in part represent.

It appears that in 1862 Reuben M. Hargreve sold the land described in the petition to Sharpley Owen for \$6000 in cash, and the two notes in suit. The title was warranted free of encumbrance.

It appears that the land was encumbered, however, by a note with vendor's privilege and mortgage, executed by W. T. Oliver, the vendor of Hargreve, and under this mortgage, which contained the non-alienation clause, the property was sold to J. P. Vinson on the fourth of January, 1868.

In reply to this defense of eviction and failure of consideration the plaintiffs insist that being holders before maturity, equities of this kind can not be opposed to them. The proof, however, shows that the notes remained till past due in the hands of the payee, R. M. Hargreve. Consequently the plaintiffs, the transferees after maturity,

 Ball, Hutchings & Co. v. Estate of Sharpley Owen.

occupy no better position than the payee would occupy in reference to the defense pleaded.

At the time of the foreclosure of the mortgage and the sale to Vinson, Sharpley Owen was dead, and his widow, the defendant, represented the succession. She testifies that she never heard of the sale until one year thereafter. No fraud is alleged or proved.

It is well settled that the vendee evicted of the property by the foreclosure of a prior mortgage, containing the pact *de non alienando*, is not bound to defend the executory proceeding or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession. It was the duty of Hargreve to remove the encumbrance existing on the property at the time of the sale, or to protect his vendee from eviction by reason thereof.

It is therefore ordered that the judgment appealed from be affirmed with costs.

 No. 4573.

E. J. GAY v. R. O. HEBERT, Tax Collector.

Where the resistance to the payment of State taxes was founded on the ground that the clerk, sheriff and recorder, before proceeding to make the assessment on which the tax is levied, gave no notice in the official journal of the parish, as required by section forty of the Revenue law, acts of 1871, 116;

Held—That the plaintiff's objection rested merely on technical grounds, inasmuch as he had paid voluntarily his parish taxes, which were levied under the same law, by the same parties, upon the same assessment, at the same time and in the same manner in every respect as the State taxes, and had several times promised to pay said taxes; and inasmuch also as he had made in this proceeding no complaint of any error, injury, or injustice in the assessment and levying of the taxes.

The object of section forty of the Revenue law of 1871 is to give the taxpayer notice, that he may have an opportunity to have errors corrected and a just assessment made. Where it is proved that he had such notice, he has no cause to complain.

There is no prohibition in the constitution against the sale of property for taxes in lots of from ten to fifty acres, or any other quantity. The fact that the constitution directs that all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres, does not inhibit the legislature from directing lands sold under other process to be similarly divided.

The impracticability of the proceeding prescribed by law and the imposing of the cost thereof upon the purchaser of lands sold for taxes, are not good grounds for an injunction on the part of the taxpayer. The consequences referred to will rest with the State and the purchaser.

A PPEAL from the Fifth Judicial District Court, parish of Iberville.
Posey, J. Barrow & Pope, for plaintiff and appellant. *A. & E. B. Talbot*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell.

HOWELL, J. The plaintiff has appealed from a judgment dissolving

NOTE.—It has been deemed unnecessary to report the cases of Carmelite Picou, Charles A. Stark, Emily Woolfork et al., and Andrew H. Gay, against the same collector, because the reasons assigned for judgment in those suits are the identical ones given in this case.—REPORTER.

an injunction sued out by him to restrain the defendant, as tax collector, from selling property to pay his State taxes.

Only two grounds are urged in this court to sustain the injunction, to wit:

First—That the clerk, sheriff and recorder, before proceeding to make the assessment on which the tax is levied, gave no notice in the official journal of the parish, as required by section forty of the Revenue law of 1871." Acts 1871, 116.

Said section is in the following words:

"That the property described in the description rolls of the tax collectors, shall be assessed by the clerk of the district court, the recorder and sheriff of the parish, who are hereby charged with such assessment, in addition to their other duties. For this purpose they shall give notice in the official journal of the parish to all taxpayers, and where there is no official paper, they will post on the courthouse door of the parish such notice, that they will assess the property of the parish for one month, commencing on the first day of August and ending on the first day of September."

It seems that there were three weekly papers published at the time, in the parish of Iberville, one of which was selected under the State law, as the official journal, another selected by the police jury as the official journal for the parish, and the other without any pretension to an official capacity; that the notice required by the above section was not published in the State official journal, but was published in the other two; that the agent of the plaintiff appeared before the board of assessors to procure the reduction of the assessment; that the plaintiff paid his parish taxes, which were levied under the same law, by the same parties, upon the same assessment, at the same time and in the same manner in every respect, as the State taxes; that he promised several times to pay the State taxes, and that he is making no complaint in this proceeding of any error, injury or injustice in the assessment and laying of the taxes, but is simply objecting on technical grounds to paying State taxes, having paid his parish taxes.

Why the notice and assessment should be good and sufficient as to one, and illegal and insufficient as to the other, we are at a loss to comprehend.

The object of the law is to give the taxpayer notice, that he may have an opportunity to have errors corrected, and a just assessment made. This the plaintiff had, and we can perceive no reasonable ground for the complaint he is urging, and particularly as he shows no injury to him by the assessment and levying of his tax.

Second—The sale could not be made in ten and fifty acre lots; first, because there is no constitutional authority; and secondly, the pro-

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vision of section sixty-three of the Revenue law is inoperative—no *modus* being provided in the act.

The said section is as follows:

“That all lands sold in pursuance of this act shall be divided in accordance with article one hundred and thirty-two of the constitution, and the cost of the survey for the purpose of division shall be borne by the party purchasing.”

There is no prohibition in the constitution against the sale of property for taxes in lots of from ten to fifty acres, or any other quantity. The fact that the constitution directs that all lands sold in pursuance of decrees of courts should be divided into tracts of from ten to fifty acres, does not inhibit the legislature from directing lands sold under other process to be similarly divided.

The impracticability of the proceeding and the imposing of the cost thereof upon the purchaser, are not good grounds for an injunction on the part of the taxpayer. He can avoid all trouble on the subject by paying his taxes, and if he fails to do so, the consequences referred to will rest with the State and the purchaser.

Judgment affirmed.

MORGAN, J., *dissenting*. I can not agree with the majority of the court in the decree which has just been rendered.

I think that where a man's property is seized under execution, it is his right to see that all the formalities required by the law have been complied with.

In the present case it is contended that the clerk, sheriff and recorder, before proceeding to make the assessment on which the tax is levied, gave no notice in the official journal of the parish as required by section forty of the revenue law of 1871.

It is admitted that there were three newspapers published in the parish where the property seized is situated. Now it appears that the only paper in which notice of assessment should have been published is precisely the only one in which it was not published.

Where no advertisement has been made the tax can not be recovered, and there is no legal advertisement except when made in the legal manner and published in the paper designated by law.

It is no answer to say that plaintiff paid his parish taxes, which were advertised in the same paper. Admitting that he waived his rights in one instance, he is not precluded from asserting them in another.

Besides there is nothing to show that he did waive any of his rights except that Butler, acting for him, appeared before the board and en-

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deavored to make arrangements with reference to the taxes. He had the right in case the demands he made were not complied with, to insist, in his turn, upon the non-compliance with the requirements of the law being a sufficient ground for refusing to comply with terms which he considered unreasonable.

It is not contended that the plaintiff ever saw the notice, and Butler, who says he represented him before the board, says he did not represent him with reference to one piece of property at least, worth \$25,000. Under any circumstances, the judgment of the lower court is erroneous as to this plantation, and I think the decree should be reversed.

 No. 4531.

FRANKLIN A. ROBERT v. LUCIEN D. COCO.

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This court can go behind the judgment of the court *a qua* to see when the obligations sued on arose between the parties.

The homestead law, exempting certain property from seizure on a judgment enforcing a mere ordinary debt is not unconstitutional. The rights of the creditor, and not his security, unless the security forms part of his contract, must be invaded before he can invoke the constitutional privilege on which he relies. The law, in this case, does not affect his vested rights, but only impairs his security for the payment of his claim.

A PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Butler, J. Henderson Taylor*, for plaintiff and appellee. *A. Barbin*, for defendant and appellant.

Justices concurring: Ludeling, Morgan, Howell.

MORGAN, J. In May 1869, Coco obtained judgment against Robert for \$633 73. In March 1872 he issued execution, and seized thereunder a certain parcel of land belonging to his judgment debtor.

Robert enjoins the sale on the ground that the land seized is all the property he owns; that the tract contains nearly one hundred and sixty acres; that it is his homestead; that it is not worth \$2000; and that it is exempt under what is known as the homestead law from seizure, for the payment of the judgment obtained against him, which was based upon a mere ordinary debt.

There was judgment in his favor perpetuating the injunction, and the defendant has appealed.

The grounds upon which appellant claims a reversal of the decree against him are:

First—That we can go behind the judgment to see when the obligations sued on arose between the parties, and

Second—Because the obligations upon which Coco's judgment was rendered, having been contracted anterior to the passage of the homestead law, it is retroactive, *ex post facto*, and unconstitutional.

Robert v. Coco.

The first proposition is correct; the second is erroneous. We can examine as to when an obligation sued on was contracted, but it does not follow that the act of the legislature in question is null and void. He stands or falls upon the constitutionality or unconstitutionality of the law. Is it unconstitutional?

Appellant claims that "no *ex post facto* or retroactive law, nor any law, impairing the obligation of contracts shall be passed, nor vested rights be divested, unless for purposes of public utility and for adequate compensation made." True, this is the language of the constitution, but we do not see that the law of which he complains impairs the obligation of his contract, or divests him of any of his vested rights; his obligor is as much bound now, his vested rights in and to the property which he has acquired, are as perfect now as they were when he acquired them. His security for the payment of the debt may have been impaired by the law, with reference to a certain piece of property, but his rights under the obligations he holds have not been interfered with. It is his rights, not his security, unless the security forms part of his contract, which is not the case here, which must be invaded before he can invoke the constitutional privilege upon which he relies.

The notes sued on were ordinary obligations. The judgment rendered upon them was never recorded. Suppose, between the rendition of the judgment and the issuing of the *fi. fa.* another and a subsequent creditor had taken a mortgage upon the property and had caused it to be recorded, would this have interfered with the defendant's vested rights, or impaired the obligation of his contract? We imagine not.

There is no error in the judgment. It is therefore affirmed with cost.

No. 4530.

ELLEN EDWARDS v. FIELDING EDWARDS.

Where the plaintiff excepted to the evidence of the defendant, who testified that he never received the money declared in the marriage contract to be the property of the mother of the plaintiff, nor did ever receive any property from her, or for her account, nor ever made the donation *propter nuptias* mentioned in the marriage contract;

Held—That the objection should have been sustained, because the notarial act could not be contradicted by parol testimony.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Butler, J. Barbin & Bcrdelon*, for plaintiff and appellant. *A. B. Irion*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff appeals from the judgment rejecting her demand against her father and natural tutor for \$2038, the separate property of her mother, and for one hundred and eighty-seven dollars and thirty-eight cents which he collected from her grandfather after the death of her mother.

Ellen Edwards v. Edwards.

The claim for one hundred and eighty-seven dollars and thirty-eight cents is not disputed.

The demand for the \$2038 is based on the marriage contract executed on the day of the marriage, which declares that the property of the future wife consists of nine hundred and eight dollars, the result of her individual gains and savings, and also one thousand dollars and certain movables estimated at one hundred and thirty dollars denoted *propter nuptias*, by the defendant.

It is admitted that the mother of the plaintiff died in 1847, and the defendant, the natural tutor, caused no inventory of the property to be made.

The plaintiff excepted to the evidence of the defendant, who testified: that he never received the money declared in the marriage contract to be the property of the mother of the plaintiff, "nor did he ever receive any property from her, or for her account, nor did he ever donate the sum of one thousand dollars, as detailed in the marriage contract." The objection should have been sustained because the notarial act could not be contradicted by parol testimony.

The nine hundred and eight dollars, dotal property, the defendant alone could administer during the marriage; and the donation, *propter nuptias*, made by himself, if ever delivered, still remained under his control, because it is not shown that the wife of the defendant ever administered her paraphernal property during the marriage. In the face of the marriage contract in which he acknowledged nine hundred and eight dollars as dotal property, and in which he agreed to donate, *propter nuptias*, one thousand dollars and certain movables estimated at one hundred and thirty dollars, the defendant, who has never caused an inventory to be made and whose possession of this property since the day of the marriage has not been disturbed, "denies that he ever received anything from his said wife; whatever she may have had, either by the gift of respondent, or by the result of her own labor, was reserved by her, and disposed of by herself."

The defense is wholly without foundation. Payment or compensation is not established, because it is not shown that the plaintiff accepted the few articles given her by her father, as a discharge in part of his indebtedness to her.

It is therefore ordered that the judgment herein be annulled, and it is now decreed that the plaintiff recover of the defendant \$2038, with five per cent. per annum interest thereon from the tenth day of October, 1847, and also the further sum of one hundred and eighty-seven dollars and eighty-three cents, with five per cent. per annum interest thereon from first June, 1859, and that the mortgage accorded by law in favor of minors be recognized and enforced from said respective dates against the property of the defendant, and that he pay costs of both courts.

No. 4560.

SUCCESSION OF A. G. PAYNE.

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Where the husband joins the wife in her petition, this is sufficient authorization to her to sue.

Where the motion was for a suspensive appeal, and the one granted was merely devolutive, if the appellant submits to this modification of his demand, the appellee, not being injured by it, can not complain.

Where the motion to appeal was made in the name of the husband and the wife, the authorization to appeal is sufficiently established, and the appeal bond can not be objected to, when made out in the name of the husband and the wife and is signed by both.

Where plaintiff was not an heir; Held—That she had no right to attack a will in so far as it related to the disposal made by the testator of his property, but that she might sue to annul it in so far as it interfered with her rights to have the tutorship of her grand children.

It is unnecessary to decide the question raised whether a testament is valid as a will by nuncupative public act, when it is good as a nuncupative will under private signature.

Where the objection to the validity of such a will was, that the person who wrote and read it was not designated therein as a witness, but as a notary;

Held—That there is no law which declares that a man, because he is a notary public, is not a good witness to a will; and there can be seen no reason why he should not be.

A will can be set aside only when the law itself pronounces it to be null on account of the want of compliance with those formalities which are declared to be sacramental.

Where A was appointed by will tutor to minors, and at the same time the testator declared that the care, management and raising of his children should be left in the hands of Miss B:

Held—That this was not appointing her tutrix; that this was merely giving her the personal care of the children, whilst the legal control of the persons and property of the minors was vested in A, who could as tutor, when he chose, remove them from her care.

A PPEAL from the Probate Court, parish of East Feliciana. *Pipkin, J. W. F. Kernan and C. E. Schmidt*, for appellants. *K. A. Cross and F. D. Brame, Race, Foster & Merrick* for appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

MORGAN, J. Appellee moves to dismiss this appeal on several grounds, which we will consider in the order in which they are presented.

First—That there is no testimony in the record showing that the plaintiff was authorized to institute and prosecute this suit.

The husband joins the wife in the petition; this is sufficient authorization.

Second—That the appeal granted from the main action was a devolutive appeal, while the motion was for a suspensive appeal.

The fact is as stated; but if the appellant submits to this modification of his demand, the appellee, not being injured by it, can not complain.

Third—The testimony does not show that plaintiff was authorized by her husband either to institute the suit or to take the appeal.

We have already said that he authorized her to sue by joining her in the suit, and as the motion for appeal was made in the name of the husband and the wife, we consider the authorization to appeal sufficiently established.

Succession of Payne.

Fourth—That the order of court does not fix the amount of the appeal bond in the injunction suit if suspensive.

The order of appeal does fix the amount of the bond. It is fixed at one hundred and fifty dollars, and the bond is made out in the name of the husband and the wife, and is signed by them both.

The motion to dismiss is therefore overruled.

ON THE MERITS.

This is a suit instituted by the maternal grandmother of the minors Payne, issue of the marriage between A. G. Payne and plaintiffs' daughter, both deceased, to annul the last will of A. G. Payne, and to cause herself to be appointed tutrix to the children.

The will which is sought to be revoked is alleged to be a nuncupative will by public act passed before a notary public and five witnesses on the thirtieth March, 1872. It gives to his two children all the property of which he dies possessed, but burdens the one-third thereof with a usufruct in favor of Miss Annie Byrne, which is to last during her life, or until she marries; appoints D. C. Hardee his executor, giving him seizin of his estate; constitutes him tutor to his children, but gives the care of them to Miss Byrne. After the will was made, and two days before his death, he married Miss Byrne.

The grounds upon which the will is sought to be annulled are :

First—That it does not furnish proof that it was written by the notary in the presence of the testator; nor in the presence of the testator and of the witnesses, as required by law; nor can that fact be necessarily implied from any expression contained in the will.

Second—That it does not express that it was ever signed by the witnesses named therein, nor by any witnesses whatever, nor in whose presence it was signed; that the will, to be valid, should state expressly that the witnesses signed the same in the presence of the notary and of the testator; and that these facts can not be necessarily implied from any expressions contained in the will.

They allege further that the will is not valid as a nuncupative will by private act, because it was not read by one of the witnesses to the testator in presence of the other witnesses, as required by law.

Defendants excepted to the petition upon the ground that plaintiff had no right of action, she being in no sense an heir of the testator, or related to him by blood.

This exception was maintained as to plaintiffs' right to sue for a revocation of the will, except as regards her right to claim the tutorship of her grand children. From a judgment rendered against her the plaintiff has appealed, both upon the exception and the merits.

The ruling of the judge on the exception was correct. Not being an heir, she had no right to attack the will in so far as it relates to the

disposal made by the testator of his property. But she is entitled to the tutorship of her grand children, unless she has been legally deprived thereof. The will does deprive her of it. It is an obstacle to the assertion of her legal rights, and she is authorized to remove it, if she can. If the will is null, the appointment of the tutor falls, and the tutorship, by law, will come to her. She may, therefore, sue to annul it, in so far as it interferes with her rights.

We do not find it necessary to decide whether the will is valid as a will by nuncupative public act. Assuming it not to be—upon which point however we express no opinion whatever—we are all of opinion that it is good as a nuncupative will under private signature.

The will is as follows :

Be it remembered, that on the thirty-first day of March, 1872, at the residence of the Rev. Alexander Galbreath Payne, a resident of the Parish of East Feliciana, I, notary, repaired to his residence in said parish, for the purpose of receiving his last will and testament, when and where, I, Henry Hawford, Notary Public in and for said parish, duly commissioned and sworn, with George W. Munday, George H. Packwood, William A. Knapp, James G. D'Armond and William V. Broadway, five competent witnesses, males, of the full age of majority, residents of said parish of East Feliciana, came personally into the presence of said Rev. Alexander Galbreath Payne, and he dictated to me his last will and testament in the presence of the above named witnesses, and I received his dispositions in his own words in presence of said witnesses as follows :

Item First—I give to my children, William S. and Alexander G. Payne, all of the property of which I may die possessed, with the exception of one-third, which one third I give and devise to Miss Annie Byrne, in usufruct during her lifetime, unless she should marry after my death, in which case the usufruct shall expire.

Item Second—I hereby appoint Colonel David C. Hardee as executor of my last will and testament, and give him full seizin of my estate; and I also appoint him tutor of my children. The care and management, and raising of my said children, I leave in the hands of Miss Annie Byrne. And it is my last will and wish that they be entrusted to her care and personal supervision.

And I, the said notary, received the foregoing testamentary disposition as dictated to me by said testator, in the presence and hearing of said five witnesses, residing in said parish and State. And I, the said notary, wrote the same as they were dictated by the testator in the presence of said five witnesses. And I then read the same in a loud tone of voice, in the presence of said five named witnesses, and in their hearing to said testator, Rev. Alexander Galbreath Payne, who declared the same to be his last will and testament, to me, notary, and

Succession of Payne.

to said five witnesses, and in the presence of said witnesses (five), and in presence of me, notary, signed the same with his own proper signature.

All of which formalities were had and observed at one time, without interruption and without turning aside to other acts, on the day and date aforesaid, at the residence of the Rev. A. C. Payne, in Clinton, said parish. It is signed by the notary twice and by the witnesses therein named.

“A nuncupative testament, under private signature, must be written by the testator himself, or by any other person from his dictation, or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place.” C. C. 1574.

“The testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in presence of the testator. It must be signed by the witnesses, or at least by two of them, in case the others knew not how to sign.” C. C. 1575.

This will was written by Henry Hawford, from the dictation of the testator, in presence of five witnesses other than Hawford. It was read by Hawford to the rest in presence of the testator. It was signed by the testator and by the witnesses.

It is objected that it was not written or read to the testator by a witness to the will. The objection is that Hawford, who wrote and read it was not a witness, but a notary. He is so designated in the will. But we know of no law which declares that a man, because he is a notary public, is not a just witness to a will, and we see no reason why he should not be. He was certainly a witness to everything which took place with regard to the making of the will, and all the law requires is that he should be a witness. The formalities required by the law are indispensable, it is true, to the proper making of testaments, but they are not snares and pitfalls by which the testator is to be caught, and into which he must necessarily fall when he attempts to do with his property what the law authorizes him to do with it. We are to sustain the will which legally disposes of a testator's property, if we can, and not to pick it to pieces by criticisms, to which almost every composition is subject; we think we can only destroy it when the law itself pronounces it to be null, and for the want of compliance with those formalities which are declared to be sacramental. In the present case we see nothing to indicate that the requirements of the law were not complied with. On the contrary, we think they were. It is further contended that the will is null because it, in point of fact, appoints a woman tutrix to the testator's children. That the law does not permit a woman to be tutrix except where they are the mothers or grandmothers of the children. But in

this case a woman was not appointed. D. C. Hardee was named. It is true the testator declared that the care and management and raising of his children should be left in the hands of Miss Byrne. This, however, is not appointing her tutrix; it is merely giving the children to her charge and management. Hardee testifies that when asked to assume the responsibility of tutor he declined, upon the ground that his own family was large and that he could not, in justice to his own, add to his duties. To obviate this objection the personal care of the children was given to another. We do not see in this the appointment of a tutrix. We look upon it as a mere designation of a person who would be competent to care for and manage them. It was the testator's last will and wish that they should be intrusted to Miss Byrne's care and personal supervision, but we do not consider this will and wish as differing in any manner from an expressed desire that they should be educated at a particular institution of learning. The test is, we believe, who has the legal control of the persons and property of the minors? The answer is, the tutor. Who is the tutor? D. C. Hardee. So long as he chooses to allow them to remain under the charge of Miss Byrne he may do so, but we imagine that if he wished to remove them from her care he could not be successfully opposed. On the contrary, we think he has the clear right to do so whenever he sees fit.

Another test would be this: Could Miss Byrne bind the minors in any manner? If she were to die, would the minors be without a tutor? These questions we think answer themselves in the negative, and dispose of the objections to the will on this point.

The judgment is affirmed.

Rehearing refused.

No. 4559.

H. M. FOWLER, JAMES S. MORGAN and als. v. ELLEN MORGAN Individually and as Tutrix.

Where it was contended that a donation *inter vivos*, made in 1858, by a white father to his two daughters who were born of a black woman, then a slave, but who, with their mother, were entitled to claim their liberty at a future time (*statu liberæ*) was in violation of law and therefore null and void;

Held—That the rights of the parties must be decided under the provisions of article 193 of the Code of 1825, and that under the circumstances of the case, the donation must be sustained, whatever may be the moral view of the question.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. Posey, J. Fuqua & Callihan, for plaintiffs and appellees. Herron & Gallagher, for defendants and appellants.

Justices concurring: Ludeling, Howell, Taliaferro.

HOWELL, J. The plaintiffs, as forced heirs of James S. Morgan, de-

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ceased, claim to be the owners, by inheritance, of a certain lot and the improvements thereon, in the town of Baton Rouge, and sue the defendant, individually and as tutrix, to recover the same and the rents thereof, alleging that the defendant pretends to hold it by virtue of a donation, dated twentieth September, 1858, to her two minor children the issue of her alleged marriage with said Morgan, which marriage they say was prohibited by law, the said defendant being then a slave, and the said minors, if the children of said Morgan, were bastards and incapable of receiving from him by donation or otherwise. The defendant pleads the general denial, admits possession of the property and avers that it belongs to her two minor children, who became the lawful owners thereof by act of donation from J. S. Morgan on the above date, which is duly recorded, and pleads the prescription of five and ten years. From a judgment in favor of the plaintiffs the defendant appeals.

The material facts as presented in the record are, that on twentieth September, 1858, the said J. S. Morgan, then a widower, by act of donation *inter vivos* before the recorder of the parish gave the property in controversy to the said two minors, acknowledging them in the act to be his daughters, and estimating the property at \$5000, H. V. Babin accepting the donation in behalf of said minors and signing the act with said donor, which was duly recorded; that the said minors and their mother, the defendant, were then *statu liberæ*; that Morgan, the donor, died in 1860, and his succession was duly opened in 1861, J. H. New being appointed administrator, who caused the said property to be inventoried as belonging to the succession, and in 1867 filed his final account, in which he represented said property and a small sum in cash as constituting the assets of the succession, to which the plaintiffs herein, residing in Ohio and Massachusetts, were entitled as the sole legitimate heirs, and judgment was rendered contradictorily with the attorney for absent heirs homologating the account, authorizing the administrator to turn over to the said heirs, the property, rights, etc., set forth in the account, canceling his bond and releasing him and his sureties from liability; and that on the seventh September, 1864, the defendant was appointed and confirmed as natural tutrix of the said minors.

It is contended, on behalf of plaintiffs, that the donation is null, because the donees, being illegitimate colored children, can receive only what is necessary to procure their sustenance or an occupation or profession, under the provisions of article 1470 of the Code of 1825, and that the donation being one of real estate in fee simple is not susceptible of redonation as contemplated by the second clause of said article, and is therefore not a settlement of the alimony, but is in violation of the letter and spirit of the said article and absolutely null.

 Fowler, Morgan and als. v. Ellen Morgan.

Whether this proposition be correct in law or not, it is unnecessary now to determine, as the rights of the parties must be settled under the provisions of article 193 of the Code of 1825, which is in the following words: "The slave who has acquired the right of being free at a future time, is from that time capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the mean time it must be administered by a curator."

As the donees had at the date of the donation acquired the right of being free at a future time, and H. V. Babin accepted the donation for them, and the defendant as their tutrix is in possession and enjoyment of the property donated, and the donees have long since become free, we must presume that the said property has been preserved for them, and that the donation has been perfected.

We can see no circumstances in this case which have defeated the rights of the children of the defendant, whatever may be the moral view of the question.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant as natural tutrix of the minors Alice and Ella Morgan, and against plaintiffs with costs in both courts.

 No. 4525.

ROSENA MICHEL v. BENJAMIN WIEL.

Where the defendant objected to the refusal of the judge *a quo* to charge the jury that actions for divorce are governed exclusively by section 1192, Revised Statutes;

Held—That the judge committed no error, and the action is instituted under article 138 C. C., amended by act No. 76, Statutes of 1870.

Where plaintiff was authorized to institute the suit, it followed that she was empowered to take a writ of sequestration or such other conservatory steps as were necessary to secure her rights.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupée. *Butler, J. Edward Phillips* and *John Yoist*, for plaintiff and appellant. *Haralson & Claiborne*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Morgan. Howell.

MORGAN, J. Defendant objected to the refusal of the judge to charge the jury that actions for divorce are governed exclusively by section 1192, Revised Statutes. The action is instituted under article 138 C. C., amended by article No. 76 Statutes 1870. Upon this point there was no error in the charge of the court.

He further objected to the introduction of any testimony which would tend to show any intemperate habits on the part of the defendant prior to the fifteenth March, 1871, on the ground that plaintiff's

Michel v. Wiel.

petition discloses the fact that on or about said fifteenth March, there was what he called a condonation by the wife of all the past offenses of the husband.

We find nothing in the petition upon which such an allegation can rest. There was, therefore, no error in the ruling of the judge on this point.

The parties were married on the twelfth December 1870. This suit, for divorce, was instituted on the fifteenth of May, 1871, on the ground of excesses, cruel treatment, and habitual drunkenness on the part of the husband. Plaintiff also claims restitution of her dotal property and judgment against her husband for \$6650, to secure which she applied for and obtained, a suit of sequestration upon the movables alleged to be in her husband's possession, the most of which were brought into marriage, which sequestration was subsequently set aside on the ground that the judge had not been authorized to sign the sequestration bond by the judge.

The defendant denies the allegations in the petition, but, in case the divorce prayed for is granted, he asks for a judgment for twenty-five hundred dollars, amount of goods alleged to have been brought by him into the marriage, or so much thereof as may be found due him on settlement of their respective rights.

The case was submitted to a jury, who found the following verdict: "We, the jury, find for the plaintiff in the divorce, but for the defendant on the moneyed demand." Upon which the judge rendered judgment in favor of the plaintiff, granting to her the divorce prayed for, and restoring to her possession certain property which she claimed, and gave a judgment in favor of defendant for twenty-five hundred dollars. The plaintiff has appealed.

There is no evidence in the record upon which to support the verdict and judgment condemning plaintiff to pay defendant any sum of money.

The marriage took place under the dotal system. By the marriage contract entered into between them the husband was recognized to have brought into the marriage property amounting to \$4410, consisting of goods valued at \$2000; accounts against various parties valued at \$2000; two hundred dollars in cash; two carts valued at one hundred and fifty dollars, and a watch valued at sixty dollars.

The wife brought \$14,907, all of which were movables, and all of which the future husband acknowledged possession of in the marriage contract which was executed on the twelfth December, 1870, and recorded on the same day. There is no evidence that any portion of this property, except three notes amounting to \$5529, ever went out of his possession, or from under his control, except that plaintiff seems to have managed the business which was carried on in his name—which

he could have assumed at any moment. There is no evidence that plaintiff owes to the defendant anything.

There was error in the judgment dissolving the sequestration. If plaintiff was authorized to institute the suit, which is not denied, she was empowered to take such conservatory steps as were necessary to secure her rights.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court in so far as it awards a judgment against the plaintiff for twenty-five hundred dollars be annulled, avoided and reversed. It is further ordered, adjudged and decreed, that the judgment in favor of the plaintiff and against the defendant for the sum of six thousand six hundred and fifty dollars, and that the sequestration of the movables of the defendant be reinstated. It is further ordered, adjudged and decreed, that in all other respects the judgment of the lower court be affirmed, appellee to pay the costs.

The words: Jury trial, omitted by error in the appeal paragraph above.

No. 3804.

SUCCESSION OF CELIA WATERER—Opposition of E. K. BRUMFIELD
to final account of Administrator.

Where the transcript is certified to be "a true copy of all the proceedings had and of all the testimony taken on the trial," it is sufficient.

Before the passage of the act of March 18, 1852, by which the community of acquets was extended, in favor of non-resident married persons, to property in this State thereafter acquired, no such community existed. The property acquired after their residence here, alone fell into the partnership.

Where the surviving husband, administrator of his wife's estate, brought with him to this State, as his personal property, more stock of every kind than he had at the decease of his wife:

Held—That, at the dissolution of the community, he has the right to take in kind, if still existing, what he brought in marriage, and from the cattle remaining a number of head equal to that brought by him in marriage.

A PPEAL from the Parish Court, parish of Washington. *Slocum, J. T. & J. Ellis*, for administrator and appellee. *John Wadsworth*, for appellants.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAFERRO, J. The appellee moves to dismiss this appeal.

First—Because the certificate is defective in not reciting that the transcript contains "all the documents filed in the suit," and that it contains "all the testimony adduced."

Second—That the transcript is signed by the deputy clerk.

Third—That the record of appeal was not brought up within the proper time after the order for a *certiorari* was issued.

Fourth—That appellant is without interest in the suit.

Succession of Waterer—Opposition of Brumfield.

The transcript is certified to be "a true copy of all the proceedings had and of all the testimony taken on the trial," etc. This suffices. 12 La. 476; 9 An. 95. The other grounds are without force. Motion overruled.

ON THE MERITS.

William Lewis administrator of the succession of his deceased wife having filed an account, it was opposed by Mrs. Brumfield, claiming the succession under an assignment from the heirs of the decedent who died intestate, leaving no heirs in the ascending or descending line. The administrator had placed upon the inventory as community property a tract of land, and claimed a credit of seven hundred dollars, the purchase price of the land, which he alleged he paid out of his separate funds. After the trial had commenced the administrator asked to amend his account, so as to claim the tract of land as his separate property, alleging error of fact in treating it as community property. The amendment was admitted. The opponent denied the payment for the land being made out of the separate funds of the administrator, and alleged that he failed to account for community property of various kinds to the amount of \$1995, and prayed that the account be rejected. The judgment of the court *a qua* decreed the tract of land to be the separate property of the administrator, and overruled the opposition, alleging there was community property of the value of \$1995 unaccounted for. The opponent appealed. We have to inquire, was the land the separate property of the administrator or community property? Did the community at the time of its dissolution own property to the amount of \$1995? Lewis, the administrator, bought the land in question on the twenty-third of September, 1846, being then a citizen of and residing in Mississippi, from whence, late in the fall of that year, he removed to Louisiana. This occurred before the passage of the act of March 18, 1852, by which the community of acquets was extended in favor of non-resident married persons to property in this State thereafter acquired. Prior to that act, no community existed in property acquired here in favor of married persons resident abroad; that acquired after their residence here, alone fell into the partnership. C. C. 2369, 2370; 9 Rob. 438; 5 An. 158; 9 An. 289; 10 An. 440.

The tract of land, therefore, was the separate property of the administrator. It was clearly an error of placing it on the inventory as community property, and he had the right to make the correction. 13 An. 369 and 370.

The property of the community consisted chiefly of stock, such as horses, cattle, sheep, etc. It appears that the administrator brought with him from Mississippi more stock of every kind than he had at the

decease of his wife. At the dissolution of the community he had the right to take in kind, if still existing, what he brought in marriage; and from the cattle remaining a number of head equal to that brought by him in marriage. C. C. 586, 587; 11 An. 278; 10 Rob. 46. After making this adjustment, it would seem that the residue, if any, would be very small.

On the part of the administrator objection was made to two written instruments offered in evidence by the opponent, to show the assignment and transfer to her of the rights of the heirs of Celia Waterer. The objections were overruled and a bill of exceptions reserved. These instruments contain merely the recitals of the persons signing them, that they are the heirs of Mrs. Waterer. They are unsworn statements not making proof of the facts recited; 11 An. 503; 14 An. 15. One of these acts was executed in the State of Mississippi. It contains an acknowledgment of the act before the clerk of the court without the attestation of the presiding judge, and is in that respect inadmissible. 6 N. S. 621. The other act was executed in Louisiana under private signature, and is without registry or authentication of any kind.

The exception was well taken; but the court in its final judgment reserved to the opponent the right to prove her interest and establish her claim at the proper time. The administrator in this case is entitled to the usufruct of the wife's half of the community property during his life. His age is over four score years, and for any residuary right the opponent may have in that property, she will not, in the course of nature, be kept waiting long.

It is ordered that the judgment of the parish court be affirmed with costs.

No. 4562.

SEYMOUR TAYLOR v. A. M. WOODWARD and als.

A judgment by default, to become executory, must be notified to the defendant, and the delays from which the right to appeal begin to run must date from the day on which the defendant was notified of the judgment.

Where the plea of prescription is filed in this court, justice requires that the case shall be remanded, at the prayer of the plaintiff, in order that he may have an opportunity of introducing evidence to interrupt the prescription.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Cross & Hardee*, for plaintiff and appellee. *T. B. Lyons*, for defendants and appellants.

Justices concurring: Ludeling, Howell, Morgan.

MORGAN, J. A motion to dismiss this appeal has been made on the ground that the appeal was not asked for within the time prescribed by law.

Taylor v. Woodward.

The suit was instituted on the first February, 1866. Petition and citation were served personally on the defendant on the third and fourth of the same month. Exceptions were filed to the proceedings, which were overruled. Default was rendered on the twenty-ninth May, 1866, and confirmed on the twenty-third October, 1869.

Petition of appeal was filed twenty-fifth January, 1873. More than one year had elapsed from the rendition of the judgment to the date of the application for appeal. No notice of judgment was served on the appellant.

The 575th article of the Code of Practice provides that "whenever an answer has been filed in a suit in which the defendant has had personal service made upon him to appear and file his answer, or when a judgment has been rendered in a case after answer filed by the defendant, or by his counsel, the party cast in the suit shall be considered duly notified of the judgment, by the fact of its being signed by the judge."

From which it would appear that a judgment by default, to become executory, must be notified to the defendant. From this it results that the delays from which the right to appeal begin to run, must date from the day upon which the defendant was notified of the judgment. The judgment by default in this case not having been notified to defendant, the appeal was properly allowed.

The motion to dismiss must be refused.

On the merits, the principal defense is the prescription of three, five and ten years. As this plea was filed in this court, we think justice requires that the case should be remanded, in order that plaintiff may have an opportunity of introducing evidence to interrupt the prescription. The party has prayed to have it remanded.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the case be remanded, to be proceeded in according to law, appellees to pay the costs of appeal.

No. 4540.

H. A. MORSE, Administrator, v. MRS. E. GRIFFITH.

The exhibition of a decree of the court in which the succession was opened, authorizing plaintiff to administer the same according to law in his capacity of public administrator, and, as such, an officer of the parish as well as of the court, must be held as at least a *prima facie* showing of capacity and authority to sue and stand in judgment in another parish.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. H. P. Wells*, for plaintiff and appellant. *E. D. & E. H. Farrar*, for defendant and appellee.

Morse, Administrator, v. Griffith.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

HOWELL, J. H. A. Morse, as public administrator for the parish of Franklin, duly appointed, as alleged, by the Governor and qualified according to law, sues the defendant in the parish of Madison to recover certain property as belonging to the succession of J. R. Cole, deceased, which he (plaintiff) is administering.

The defendant excepts that the plaintiff has no legal capacity to stand in judgment, and is not the administrator of the said succession of Cole, and, therefore, he has no legal authority to prosecute this suit.

On the trial of this exception plaintiff introduced in evidence a copy of a judgment in the suit of H. A. Morse, public administrator, v. Mrs. E. A. Cole, in the parish court of Franklin, removing the said Mrs. Cole as administratrix of the succession of J. R. Cole, ordering her to render an account of her administration, and appointing and confirming H. A. Morse, public administrator of the parish of Franklin, administrator of the said succession of J. R. Cole, deceased, and authorizing him to administer the same according to law. Upon this evidence the judge *a quo* sustained the exception and dismissed the suit. The plaintiff has appealed. We think the court erred. There was, to say the least, a *prima facie* showing of capacity and authority to sue and stand in judgment. The plaintiff exhibited his authority from the court in which the succession was opened, to administer the same according to law in his capacity of public administrator, an officer of the parish as well as of the court, and his identity is not questioned. The presumptions are in his favor.

It is therefore ordered that the judgment appealed from be reversed and the exceptions overruled, and that this case be remanded to be proceeded in according to law. Defendant and appellee to pay costs of this proceeding in both courts.

No. 4555.

VICTOR MOREAU v. CELESTIN MOREAU, JR., Tutor, T. F. THIENMAN,
Intervenor.

An intervention can not be sustained where the demand is not incidental to the main action and where the intervenor neither joins the plaintiff in claiming the same thing, or any thing connected with it, nor unites with the defendant in resisting the claim of the plaintiff, nor claims a privilege on the proceeds of any thing which has been sold, or pretends to be the owner of the thing which has been seized.

The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts.

Where the demand of an intervenor does not grow out of the principal action and is not specially permitted by law, it must be dismissed.

Where the rights of the plaintiff had neither been ascertained, nor could be ascertained until a settlement of his mother's succession had been had, he must prove this settlement, and then sue for a partition.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Butler, J. Henderson Taylor*, for plaintiff and appellant.

Moreau v. Moreau, Jr., Tutor, Thienman, Administrator.

Irion and Thorpe, for defendant and appellee. *Edwards & Ducote*, for intervenor.

Justices concurring: Ludeling, Howell, Morgan.

MORGAN, J. This is an action on the part of one of the major heirs of Mrs. Helena Bordelon against his minor co-heirs, represented by their father as tutor, to recover his interest in his mother's succession, which he alleges to be of the value of \$670 67.

The tutor pleads the general issue as to indebtedness.

Thienman, a merchant, intervenes, and claims \$2518 53 with interest, for supplies and provisions, mules, etc., furnished by him to Moreau, to enable him to cultivate his plantation. He avers that part of this debt, say \$1800, was contracted and became due during the lifetime of Mrs. Moreau (Helena Bordelon), and is a community debt due by said estate, over which the said Moreau has the administration as natural tutor.

From this statement of the case it is evident that we can not do justice between the parties under the proceedings they have seen fit to institute.

In the first place, as to the intervenor, he can not be heard. His demand is not incidental to the main action. C. P. 364. He does not join the plaintiff in claiming the same thing, or any thing connected with it, nor does he unite with the defendant in resisting the claim of the plaintiff. C. P. 339. Neither does he claim a privilege on the proceeds of any thing which has been sold, or pretend to be the owner of the thing which has been seized. C. P. 396. And these are the only circumstances under which, we believe, that interventions are allowed. If he has any claim at all it is against the succession of Mrs. Bordelon Moreau, for her share of a community debt. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. 12 R. 215. Where the demand of an intervenor does not grow out of the principal action, and is not specially permitted by law, it must be dismissed. 2 An. 463.

As to the plaintiff, his rights have never been ascertained, and they can not be ascertained until a settlement of his mother's succession has been had. He must first provoke this settlement, and then sue for a partition.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided annulled and reversed, without prejudice to the rights of the parties to vindicate their rights in a proper action, the costs to be paid by appellee.

Meyer & Bro. v. Dupree and al.

No. 4597.

MEYER & BRO. v. R. L. DUPREE and al.

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Where an appeal was asked to be dismissed on the ground that all the parties in interest were not parties to the appeal, the intervenor in the suit not having given an appeal bond, and not having appealed:

Held—That the ground is not a good one. Because the intervenor does not choose to appeal, it does not follow that the defendant may not.

Where the record was incomplete, the clerk of the district court certifying that a part of the evidence used in the court below was missing at the time the record was made out, this is a good ground to remand the case, but not to dismiss the appeal.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J.* Trial by jury. *Kernan & Lyons*, for plaintiffs and appellees. *K. A. Cross* and *B. R. Forman*, for defendants and intervenor.

Justices concurring: Ludeling, Howell, and Morgan.

MORGAN, J. We are asked to dismiss this appeal on the grounds:

First—That all the parties in interest are not parties to the appeal, Mrs. Gaulden, the intervenor, not having given any appeal bond, and not having appealed, and

Second—That the record is incomplete, the clerk of the district court certifying that part of the evidence used in the court below was missing at the time the record was made out.

The first ground is not a good one. Because the intervenor does not choose to appeal, it does not follow that the defendant may not.

The second ground may, and is a good one to remand the case, but is no reason for dismissing the appeal. 5 An. 602; 12 An. 83.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided and reversed; that the case be remanded to be proceeded in according to law. Plaintiffs to pay the costs of appeal.

No. 4583.

SUCCESSION OF WALTER O. WINN—On application of O. K. HAWLEY, Public Administrator.

Construing the statute of twenty-eighth February, 1870, in connection with section 3990 of the Revised Statutes, the sense resulting from both is, that section 3990 of the Revised Statutes does not include within its general sweep the acts of the General Assembly during the session of 1870. On the contrary, the acts and joint resolutions of the General Assembly passed during the session of 1870 should take precedence of the act adopting the Revised Statutes, and be held as repealing in whole or in part any of those revised statutes that might be found to be in opposition or in conflict with the enactments or joint resolutions of the session of 1870.

A PPEAL from the Parish Court, parish of Rapides. *Daigre, J.*, *Bowman* for appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAFERRO, J. The executrix of Walter O. Winn, resident in the

State of Kentucky, and regardless of her duties as executrix of the estate of her deceased husband, the court, at the instance of one of the creditors of the estate, ordered that suit be instituted to divest her of the office, when O. K. Hawley, representing himself to be public administrator of the parish of Rapides, filed a petition on the twelfth of September, 1871, setting forth the non-residence of the executrix, and her neglect of duty, and praying that the order to institute the suit to divest her of office be addressed to him as public administrator of the parish; that she be dismissed from office, and that he be recognized as dative testamentary executor in pursuance of the provisions of an act of the Legislature "providing for the appointment of public administrators, and defining the duties of the same," approved March 5, 1870. Thereupon the executrix, by her attorney, filed an account, which was opposed by Hawley as public administrator. An exception was filed on the part of the executrix to the authority and right of Hawley to appear in the capacity he assumed, the ground being that the office of public administrator was abolished, and that no such office was then known to the law.

The exception was sustained, and Hawley, as public administrator, appealed.

The ground upon which the court *a qua* placed its judgment is, that the act of March 5, 1870, does not appear in the Revised Statutes adopted on the fourteenth March, 1870; that the last section of the Revised Statutes 3990 repeals all laws contrary to or in conflict with the provisions of the act adopting the Revised Statutes, and that the provisions of the Civil Code, Code of Practice and Revised Statutes, in regard to the appointment of administrators of estates and curators of vacant successions, are in direct antagonism to the act of March 5, 1870, establishing public administrators, etc., and that the adopting clause necessarily also repealed the repugnant act of twenty-eighth February, 1870.

We think the court erred. The purpose of the lawmaker expressed by the act No. 50, approved February 28, 1870, seems to have been to avoid the very difficulties that have arisen in this case, and which might have arisen in many other instances had they not been guarded against by the special statute of twenty-eighth February, 1870. Construing that statute in connection with section 3990 of the Revised Statutes, the sense resulting from both is that section 3990 of the Revised Statutes does not include within its general sweep the acts of the General Assembly passed during the session of 1870. On the contrary, that the acts and joint resolutions of the General Assembly passed during the session of 1870, should take precedence of the act adopting the Revised Statutes, and be held as repealing in whole or in part, any of those revised statutes that might be found to be in oppo-

sition to or in conflict with the enactments or joint resolutions of the session of 1870.

It is therefore ordered that the judgment of the parish court be annulled and reversed. It is further ordered that this case be remanded to the court of the first instance for further proceedings according to law, the appellee paying costs of appeal.

Wyly, J., being absent, took no part in this decision.

No. 2862.

ROBERT D. URQUHART v. M. CARVIN.

A release in a case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety, defendant on the bond. As a public officer, the sheriff has not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. C. M. Conrad & Son*, for plaintiff and appellant. *E. W. Huntington*, for defendant and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff, who sued the defendant, the surety on a release bond in his case of provisional seizure against Mary L. Green, appeals from the judgment rejecting his demand.

The defense is that at the time the bond was given, there was no law authorizing the release on bond of furniture provisionally seized.

This is conceded. But the plaintiff contends that the bond is at least an ordinary conventional obligation, and on the principle as one binds himself so shall he be bound, he is entitled to recover against the defendant. The difficulty of this theory is, the doubt whether the instrument can be regarded as an ordinary conventional obligation. How can the plaintiff demand the enforcement of a conventional contract to which he was not a party? Where is the *aggregatio mentium* between the plaintiff and the defendant?

It is not pretended that he gave the sheriff a power of attorney to contract for him; and as a public officer the sheriff was wholly without authority to make contracts of this character; it was no part of his duty to make an ordinary contract for the plaintiff. Without authority to bind the plaintiff, how can it be pretended that the sheriff could consent for him, or in his behalf make a valid commutative contract with the defendant or the party for whom the defendant was security.

Viewing the bond as merely a commutative contract, we are of

 Urquhart v. Carvin.

opinion that the plaintiff can not recover upon it, because not being a party thereto it was not binding on him; there was no reciprocal obligation on his part. Incurring no obligation himself, there existed no commutative contract between him and the party for whom the defendant is security. Revised Code 1765, 1766, 1768, 1770, 1797.

Judgment affirmed.

No. 4561.

F. CRILLY v. SHERIFF and als.

The property exempted from seizure and sale by section 1691, Revised Statutes of 1870, is predial and not urban.

The general rule is, that the property of the debtor is the common pledge of his creditors. Exemption laws create exceptions to this general rule which are not to be extended beyond the express terms of the lawgiver.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Kilbourn & McVea*, for defendants and appellees. *Wedge & Cross*, for plaintiff and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. This is an injunction suit to prevent the sale of a house and lots in the city of Jackson, Louisiana, under an order of seizure and sale, on the grounds that the property is not worth more than two thousand dollars; that it is his homestead, and that he has a child dependent on him.

The evidence shows that the property seized is worth more than two thousand dollars.

There was judgment in favor of the defendants, dissolving the injunction. Section 1691 of the Revised Statutes of 1870, provides that "in addition to the property and effects now exempted from seizure and sale under execution, one hundred and sixty acres of ground, and the buildings and improvements thereon, occupied as a residence, and *bona fide* owned by the debtor, having a family, or mother, or father, or person or persons dependent on him for support; also, one work horse, one wagon or cart, one yoke of oxen, two cows and calves, twenty-five head of hogs, or one thousand pounds of bacon, or equivalent in pork, and, if a farmer, the necessary quantity of corn or fodder for the current year; provided that the property herein declared to be exempt from seizure and sale does not exceed in value two thousand dollars," etc. And the plaintiff in injunction relies upon this provision of the law to justify his action.

We think the property exempted from seizure and sale in the foregoing law is predial, and not urban property. It exempts one hundred and sixty acres of land, and the improvements and buildings

Crilly v. Sheriff and als.

thereon, and such other property as is usually attached to a farm to contribute to the support of the farmer and his family.

The general rule is that the property of the debtor is the common pledge of his creditors; exemption laws create exceptions to the general rule, and they are not to be extended beyond the express terms of the law.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

No. 4580.

J. V. SEVIER and als v. GEORGE SARGENT and als.

Where some of the appellants have not given bond and perfected the appeal, and some have, it is no ground for a motion to dismiss the appeal because of the want of proper parties; and where the bond is in favor of the clerk and the order of appeal was granted in open court, all parties not appellants are appellees.

Where the heirs were put in possession of the property of their ancestor, if the partition between them be defective as a judicial partition, it is certainly valid as a conventional one, all being of age and signing the act.

By the express terms of article 1671 of the Revised Code, the heirs can at any time take the seizin from the testamentary executor on offering him a sum sufficient to pay the movable legacies, and on complying with the requirements of article 1012.

Where the heirs went into possession and partitioned the property, the succession was wound up, because it ceased to exist. A creditor of the deceased became the creditor of his heirs, each being bound to him for his share of their ancestor's debt. If some of the heirs are not solvent, and the creditor may lose part of his claim, the fault is attributable to himself; he might have required security from the heirs before they obtained actual delivery of the inherited property.

Whether the executor be discharged or not, the remedy of a creditor is not against him, but against the heirs who have been put in possession of the property of which they have become the owners and who are bound to pay the debts of the deceased, each his virile share.

APPEAL from the Parish Court, parish of Tensas. *Cordill, J. Farrar & Rieves*, for plaintiffs and appellees. *Drake, Garrett & Spencer*, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro, Wyly, Morgan.

WYLY, J. The motion to dismiss this appeal for want of proper parties, is denied; because if all of the appellants have not given bond and perfected the appeal, some have; and as the bond is in favor of the clerk and the order of appeal was granted in open court, all parties not appellants are appellees.

The plaintiff, a creditor of the deceased, sues to set aside the order putting the heirs in possession of the property belonging to the succession of J. G. Gordon and homologating the partition thereof. He also sues to annul the judgment homologating the final account of the dative executor and canceling his bond. He charges fraud and collusion between the executor and the heirs. He alleges that the judgment homologating the account and discharging the executor is

void for want of proper parties, and that it is not sustained by sufficient legal evidence; that it was obtained in fraud of the law and in violation of that provision thereof, which declares that, "executors shall continue in office until the estate is finally wound up."

He also complains of irregularities in the judicial partition, and charges that the possession of the heirs is an illegal possession.

The court annulled and set aside the judgment homologating the final account of the executor and discharging him, declared the partition of the succession an absolute nullity, and ordered Sargent, the executor, to resume the possession and administration of the property heretofore held by him as the executor of J. G. Gordon. From this judgment the defendants appeal.

Many interesting questions have been discussed in the elaborate briefs filed in this case, but upon which it is not necessary to pass.

As a matter of fact the heirs were put in possession of the property of their ancestor; and if the partition between them be defective as a judicial partition, it is certainly valid as a conventional one, all being of age and signing the act. No fraud is proved, and indeed it would be difficult to conceive how there could be fraud in the exercise of an undoubted legal right by the heirs, to wit: The right to take possession of the property of their ancestor, there being no movable legacies, there being no demand for the separation of patrimony, and the creditors not demanding security.

By the express terms of article 1671 of the Revised Code, "the heirs can at any time take the seizin from the testamentary executor on offering him a sum sufficient to pay the movable legacies, and on complying with the requirements of article 1012," which declares that they shall not have actual delivery of the property, unless they give bond "with good and sufficient security, if the plaintiffs in such suits require it."

In the case of Fowler against this same succession, 24 An. 270; the precise question was considered by this court and it was held that, "the heirs had the right to demand the seizin from the executor, and he had no right to refuse it."

When the heirs went into possession and partitioned the property the succession was wound up, because it ceased to exist. The plaintiff ceased to be a creditor of the deceased and became the creditor of the heirs, each being bound to him for his share of their ancestor's debt. If some of the heirs are not solvent and the plaintiff may lose part of his claim, the fault is attributable to himself; he might have required security from the heirs, but failed to do so. The final account of the executor, containing all the necessary formalities, was duly homologated, and he was discharged after thirty days notice being duly published. This publication was sufficient notice to the plaintiff.

Sevier and als. v. Sargent and als.

But whether the executor be discharged or not, the remedy of the plaintiff, a creditor, is not against him, but against the heirs, who are the owners of the property of their ancestor, and who are bound to pay his debts, each his virile share.

It is therefore ordered that the judgment appealed from be annulled and reversed, and it is ordered that plaintiffs' demand be rejected, with costs of both courts.

No. 4511.

MARIA J. DUPRE, Tutrix, v. THOMAS F. SWAFFORD and al.

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An injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued.

Where it was pleaded that an injunction ought to be dissolved, because the party applying for it as tutrix set forth in her petition grounds which could have been urged in the defense to a petitory action against her individuality;

Held—That the plea is not valid. On the plea that a tutrix can not authorize another person to bind the minors on an injunction bond:

Held—That it is the duty of a tutrix to protect the rights of her wards, and if, in the accomplishment of that duty, it becomes necessary to execute a judicial bond, she has the right to do so.

A PPEAL from the Ninth Judicial District Court, parish of Grant. *Orsborn, J. W. L. Richardson* and *A. Cazabat*, for plaintiff and appellant. *R. J. Bowman*, for defendants and appellees.

Justices concurring: Ludeling, Howell, Morgan.

LUDELING, C. J. The defendant, Swafford, having obtained a judgment against Maria J. Dupré in her individual capacity, was proceeding to have the property in controversy placed in his possession, when the plaintiff, as tutrix of her minor children, enjoined the sheriff. The defendants filed a motion to dissolve the injunction on the following grounds: That the said Maria J. Dupré is not tutrix; if she is at present, she was not at the time the injunction was sued out; that the grounds set forth in her petition of injunction could have been urged in the defense to the petitory action against Maria J. Dupré, and can not now be made the grounds for an injunction; that a tutrix can not authorize another to bind the minors on an injunction bond.

To the first objection, it is a sufficient answer to state that an injunction will not be set aside for irregularities, when it appears from the face of the papers that another would be issued. To the second objection the answer is, that Maria J. Dupré, tutrix, was not a party to the petitory action between Swafford and M. J. Dupré, individually. To the third objection it is sufficient to say that it is the duty of the tutrix to protect the rights of her wards, and if to do that it becomes necessary to execute a judicial bond, she has the right to do so. This is too clear to require further notice.

It is therefore ordered and adjudged, that the judgment of the lower court be set aside, and that the case be remanded to be proceeded with according to law.

Charlotte F. L. Stafford v. James M. Stafford, her husband.

No. 3805.

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CHARLOTTE F. L. STAFFORD v. JAMES M. STAFFORD, her husband—
CALVIN TATE and al., Intervenors.

The law reprobates a multiplicity of actions and aims at protecting parties against the annoyance of repeated lawsuits in regard to the same subject matter.

"If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus." C. P. art. 156.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. J. Bowman* and *T. S. White*, for plaintiff and appellee. *Seay & Manning*, for intervenors and appellants.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

TALIAFERRO, J. In this case a wife brings suit against her husband for \$13,000, alleged to be for moneys of her separate estate, received by him and converted to his own use. Certain creditors of the husband intervene and contest her claims, averring that they are unfounded, and gotten up for the fraudulent purpose of depriving them of a tract of land formerly the property of the husband, but which they had purchased at sheriff's sale, under legal process, to enforce payment by the husband of notes given by him for the price of the land. They further allege that in a former suit against her husband, the plaintiff in this action obtained a judgment against him for \$2000, decreeing likewise a separation of property, and dissolving the community of acquets and gains. There was judgment in the court below in favor of the plaintiff for the amount claimed, and the intervenors have appealed.

The litigation between these parties includes another suit recently decided by this court on appeal, in which one of the intervenors brought a petitory action to recover from the wife and her husband a tract of land and plantation in the parish of Rapides. It appears that the plaintiff in this suit obtained judgment for the sum of \$2000 against her husband on the seventeenth of May, 1869, on account of paraphernal rights, and that she claimed at that time no larger sum as owing to her by her husband. The present action was commenced on the eighth November following, and on the eleventh of that month the husband by a notarial act transferred to his wife the property in contestation as a *dation en paiement* of the claim against him for \$13,000. The evidence in the record, we think, tends to raise well founded doubts of the fairness and genuineness of this claim set up by the wife. It is shown that the rights now set up by her, if *bona fide* and unsatisfied, existed anterior to the time of her commencing her first suit against her husband, in which she claimed only the sum of two thousand dollars. There is nothing whatever tending to explain an omission so anomalous and unusual as that of praying judgment

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only for an inconsiderable part of her demand, the whole of which, as alleged in her petition in the first suit, was in danger of being lost from the embarrassed condition of her husband's affairs. "If one demand less than is due him and do not amend his petition, in order to augment his demand, he shall lose the overplus." C. P. 156; 14 L. R. 140; 2 Rob. 207; 14 An. 316.

The law reprobates a multiplicity of actions, and aims to protect parties against the annoyance of repeated lawsuits in regard to the same subject matter.

We conclude after a full consideration of this case that the plaintiff ought not to recover, and that the judgment of the lower court should not be sustained.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment against the plaintiff rejecting her demand, with costs in both courts.

ON REHEARING.

HOWELL, J. After a careful re-examination of the pleadings, evidence and arguments in this case, we are unable to change the opinion we have already given. We think art. 156 C. P. must be held to apply to a case like this.

It is therefore ordered that the decree heretofore rendered by us remain undisturbed.

No. 3210.

JOSEPH BRUIN v. W. M. SASSER.

It is the settled jurisprudence of this court that there is no authority for rendering a judgment against the defendant in a suit on a promissory note given for the purchase of a slave, guaranteed to be such for life, but subsequently set free by the Government of the United States.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Lewis, J. Hyams & Jonas and Manning*, for plaintiff and appellee. *A. N. Ogden, Ryan & White*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

MORGAN, J. This case comes up on the following statement of facts:

"The note herein sued upon was given to the plaintiff, Joseph Bruin, by the defendant, Sasser, being the balance due on a slave for life, guaranteed to be such by the said plaintiff, in the act of sale passed before a notary public in the city of New Orleans, Louisiana, at the time the note is dated.

Bruin v. Sasser.

"The slave was a mechanic, and defendant paid the plaintiff \$1600 cash, and gave besides the note herein sued upon, at the time of the purchase.

"The slave so purchased, remained in possession of the defendant until he was emancipated or set free by the Government, in 1864 or 1865."

Under the settled jurisprudence of this court, there is no authority for the judgment herein rendered against the defendant.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that there be judgment in favor of the defendant, the costs in both courts to be paid by plaintiff and appellee.

Wyly, J., being absent took no part in this decision.

No. 2746.

DAVID A. MARTIN v. MRS. L. A. CANNON, Administratrix et al.

Where an exception to the suit was filed on the ground that the heir had been put in possession of the property and the administratrix could not be sued, and where, on said plea, the exception as to the administratrix was sustained, and the case was tried as to the heir; Held—That the suit should have been dismissed.

The Second District Court of the parish of Orleans has only probate jurisdiction, and had not jurisdiction to try the suit against the heir who had been put in possession of the property of the succession.

Where, on plaintiff's appeal, the judgment of the court *a qua* was reversed and plaintiff's suit dismissed;

Held—(On rehearing: That plaintiff is to pay costs in the court *a qua*, and appellee the costs of appeal.

APPEAL from the Second District Court, parish of Orleans, *Duvigneaud, J. Race, Foster & Merrick*, for plaintiff and appellant. *W. B. Koontz and L. Madison Day*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Kennard.

LUDELING, C. J. This suit is brought to recover from the succession of Elijah Cannon certain moneys collected by E. Cannon, as agent of the plaintiff, and to recover the amount of certain notes alleged to have been executed by E. Cannon. The petition alleges that Mrs. Marie Louise Cannon, wife of W. B. Koontz, has been put in possession of said property, after having given bond according to law, and judgment is prayed for against the administratrix aforesaid, and in the event the administratrix fails to pay the judgment, that there be judgment against the said heir.

An exception was filed to this suit, on the ground that the heir had been put in possession of the property, and the administratrix could not be sued. The exception as to the administratrix was sustained, and the case was tried as to the heir. We think the suit should have

Martin v. Mrs. L. A. Cannon, Administratrix et al.

been dismissed. Article 996, Code of Practice, declares, "the case is different when such estates are in possession of heirs either present or represented in the State, although all or some of those heirs be minors; for in such case the actions for debts due such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators if they be under age or interdicted."

The Second District Court of the parish of Orleans has only probate jurisdiction, and had not jurisdiction to try the suit against the heir who had been put in possession of the property of the succession.

It is therefore ordered and adjudged that the judgment of the court *a qua* be annulled, and that there be judgment dismissing the plaintiff's action, with costs, without prejudice to his right to bring the suit in a proper tribunal.

ON REHEARING.

Justices concurring: Ludeling, Howell, Taliaferro, Morgan, Wyly.

MORGAN, J. A rehearing was granted in this case upon the question of costs of appeal. Costs follow the judgment, and as the judgment was in favor of appellant, it is now ordered that the judgment heretofore rendered by us be amended so as to read as follows:

It is therefore ordered, adjudged and decreed that the judgment of the court *a qua* be annulled, and that there be judgment dismissing the plaintiff's action, without prejudice to his right to bring the suit in a proper tribunal, the costs of the lower court to be paid by plaintiff, and the costs of appeal by the appellees.

No. 2676.

CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA v. E. BLANC AND J. A. BLANC.

Where a rule was taken on the holder of a judicial mortgage and on the recorder of mortgages to show cause why said judicial mortgage should not be canceled and erased, on the ground that the notes on which the judgment was founded were given in part payment of the price of a slave;

Held—That the judgment was *ab initio* void. The court was without power to render it, the notes were illegal and invalid, and the judgment in which they merged necessarily so likewise.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. J. Lavergne*, for plaintiffs and appellants. *Hornor & Benedict*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAFERRO, J. This is a proceeding to cause to be annulled the recording of a judgment, from which a judicial mortgage purported

Consolidated Association of the Planters of Louisiana v. E. Blanc and J. A. Blanc.

to exist. The facts are that in March, 1862, Everiste Blanc bought a slave on credit, and gave three notes for the price, each note for \$216 66½. These notes were drawn by E. Blanc to the order of and indorsed by James Arthur Blanc, and were discounted in the ordinary way of business by the plaintiffs. On the eleventh June, 1866, the plaintiffs obtained final judgment on all three of these notes, and had the judgment recorded to operate a judicial mortgage.

On the eleventh January, 1870, E. Blanc took a rule on the plaintiffs and the recorder of mortgages to show cause why the judicial mortgage showing on the records of the office should not be canceled and erased, on the ground that the notes on which the judgment was founded were given in part payment of the price of a slave. The sale was made absolute, and the defendants in rule have appealed.

The judgment was *ab initio* void. The court was without power to render it. The consideration for which the notes sued upon were given was one reprobated by law. The notes were illegal and invalid, and the judgment in which they were merged necessarily so likewise. *Wainwright v. Bridges*, 19 An. 234; *Groves v. Clark & Carneal*, 21 An. 567.

Judgment affirmed.

No. 4624.

THE STATE ex rel. NELSON & POPPLETON v. JUDGE OF THE SIXTH DISTRICT COURT, PARISH OF ORLEANS.

Where the defendant, after pleading to the merits, made a reconventional demand, and the judge refused to fix the cause for trial unless the *defendant* should give security for costs; Held—That there is no known law or practice which could justify his conduct, and that none had been referred to by said judge.

APPPLICATION for a Mandamus on *Saucier*, Judge of the Sixth District Court, parish of Orleans. *George L. Bright*, for relator.

Justices concurring: Ludeling, Howell and Morgan.

LUDELING, C. J. The suit of the New Orleans and Bay Island Company v. Nelson & Poppleton is pending in the Sixth District Court. The defendant, after pleading to the merits, made a reconventional demand.

The Judge of the Sixth District Court refuses to fix this cause for trial unless the *defendant* shall give security for costs.

We know of no law or practice which would justify his conduct—nor has he referred us to any.

It is therefore ordered and adjudged that the judge *a quo* cause the clerk of his court to reinstate the said suit on the jury docket, and that the said case be called and fixed for trial according to law.

No. 4417.

STATE ex rel. JOHN C. BACH v. LOUISIANA LEVEE COMPANY.

A party should not be listened to, when urging technical irregularities in the proceedings to which he was himself a party, in order that he should enrich himself at the expense of others.

APPEAL from the Eighth District Court, parish of Orleans *Dibble, J. Labatt & Aroni*, for relator and appellant. *A. Pitot and Semmes & Mott*, for respondent and appellee.

Justices concurring: Ludeling, Howell, Morgan.

LUDELING, C. J. This is a proceeding by mandamus to compel the defendant to issue to him a certain proportion of the sixty thousand shares of stock, which he says has been illegally issued to various parties.

The capital of the company was originally three millions of dollars, represented by thirty thousand shares. Three thousand shares were to be used for incidental expenses; twenty-seven thousand shares were distributed between the twenty-seven incorporators, each receiving one thousand shares, "to be reimbursed for labor, time and money expended in the organization of the company," it is said.

The capital was afterwards raised to ten millions of dollars, and the balance of the unissued stock, seventy-three thousand shares, were given to Wilmans, under an agreement with him to furnish the means necessary to build the levees contracted for by the company.

Wilmans failed to comply with his contract, and he delivered his stock, minus thirteen thousand shares, to Governor Warmoth. The contract with Wilmans was declared annulled by the company, and his position as president of the company was declared vacant.

At this juncture Governor Warmoth threatened to cause proceedings to be instituted to forfeit the contract of the company with the State, unless steps were taken by it to enable it to comply with its contract. On the twenty-second of November, 1871, a committee was appointed to prepare modifications of the charter. The modification to reduce the capital to 22,104 shares was agreed to at a meeting of the stockholders. A committee was then appointed to receive the Wilmans stock from Governor Warmoth. It had been previously agreed that the sixty thousand shares held by Governor Warmoth was to be equally distributed between twelve persons, John G. Gaines, D. F. Kenner, Generes and others, who were to furnish three hundred thousand dollars cash to the company. But in order to compel the original twenty-seven incorporators to contribute their pro rata of money to the enterprise, it was stipulated that the stock should be made preferred stock by paying five dollars per share, and the preferred stock should be entitled to a dividend of twenty per cent before the ordinary

State ex rel. Bach v. Louisiana Levee Company.

stock should receive any. This seems to have been approved by all parties, and the sixty thousand shares were accordingly issued to Gaines, Kenner and their associates, who seem to have complied with their part of the agreement. Mr. Bach appears to have approved of these proceedings, for he was one of the commissioners of election when the directors of the company were elected on the tenth of April, 1872.

We do not think he should be listened to, when urging technical irregularities in the proceedings to which he was himself a party, in order that he should enrich himself at the expense of others.

There is no equity in his demand, even if he could proceed by mandamus against the company to accomplish the object of his suit.

Our judgment is that there is no error in the judgment appealed from.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

No. 4570.

J. W. WEATHERLY, Agent, v. A. H. BAKER. G. JOHNSON, Intervenor.

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The lessee has the right to sublease when there is no interdiction to that effect, and on such terms as may be agreed on between him and the sublessee, and where it is shown that the sublessee did not make any payment in anticipation of the terms of his contract, he is not liable to the lessor for more than he owes the principal lessee. No law is referred to by the plaintiff which requires the lease made in this instance by the principal lessee to the sublessee to be in writing.

APPEAL from the Thirteenth Judicial District Court, parish of Texas. *Hough, J. Reeve Lewis* and *J. W. Montgomery*, for plaintiff and appellant. *H. W. Drake* and *H. R. Steele*, for intervenor.

Justices concurring: Ludeling, Howell and Taliaferro.

HOWELL, J. The plaintiff brought suit on a lease and caused certain property on the premises to be provisionally seized. One G. Johnson, as a sublessee of the defendant, intervened, claiming to be the owner of a portion of the property seized, and from a judgment in his favor the plaintiff has appealed.

He complains that the sublease was a verbal one, unknown to him, and the terms thereof so fixed as to enable the principal tenant to shield the price of the sublease from the pursuit of the principal lessor; and he asks that the court will expound the law on this subject for the benefit of owners of plantations who may wish to rent their lands.

Article 2625, R. C. C., declares that: "The lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted. The interdiction may be for the whole, or for a part; and this clause is always construed strictly."

Weatherly v. Baker.

Articles 2705 and 2706, give to the lessor the right of pledge on all the movable effects of the lessee found on the premises (except certain articles exempted), and also those of the under tenant, *so far as the latter is indebted to the principal, at the time when the proprietor chooses to exercise his right.* A payment made *in anticipation*, by the under tenant to his principal, does not release him from the owner's claim.

From these provisions of the law, it is clear that, as there was no interdiction, the defendant had the right to sublease, as he did, and on such terms as might be agreed on. And as it is abundantly shown that the intervenor did not make a payment in anticipation of the terms of his contract, he was not liable to the plaintiff for more than he owed to the principal lessee. This he admitted and did not claim the property to that extent. We are referred to no law which requires such leases to be in writing.

We think the judge *a quo* has done justice.

Judgment affirmed.

No. 4529.

LUCIEN D. COCO *v.* JAMES HARDIE. J. V. & M. RABALAIS, Warrantors.

Damages for a suit, unless malice is shown, can not be recovered.

There is no ground for a call in warranty in a case of trespass, and hence there is no right of action against warrantors.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Butler, J. Overton, Waddill & Barbin*, for plaintiff and appellee. *Irion & Thorpe*, for defendant and appellant. *Cullum & Joffrion*, for warrantors.

Justices concurring: Ludelling, Taliaferro, Howell, Morgan.

HOWELL, J. Plaintiff sues defendant for the value of a large number of cypress trees at ten dollars each, cut on his land by the defendant, who calls in warranty J. V. & M. Rabalais from whom he obtained permission to cut cypress trees on their lands, and by whom the lines of their said lands were pointed out to him, and he was authorized to cut within such lines, which he did. The warrantors deny that there is any cause of action against them; aver that they pointed out to defendant the limits of their own lands and did not authorize him to trespass on plaintiff's land, and they pray for damages against him. Judgment was rendered in favor of plaintiff for \$1350, just half of what he claimed, and in favor of warrantors; also against defendant, for one hundred and fifty dollars special damages; the defendant to pay all costs, and he has appealed.

The judgment in favor of the warrantors is erroneous. Damages for a suit, unless malice is shown, can not be recovered. Sedgwick, *Measure of Damages*, p. 33. There is no ground for a call in warranty in a

Coco v. Hardie.

case of trespass. 8 N. S. 549; 2 An. 219. And hence there is no right of action against these warrantors.

As to the plaintiff and defendant the only question is in regard to the value of the trees. Some witnesses say they are worth ten dollars, others five dollars, and others four dollars each, while it is shown that the two parties called in warranty sold theirs to the defendant at one dollar each; but it is also shown that the trees cut by the defendant on plaintiff's land were of better quality, never having been culled, and were in better position than those on the lands of the said warrantors. Under the circumstances we see no good reason for adopting a different law from that fixed by the district judge, whose opinion upon this point is entitled to great weight.

It is therefore ordered that the judgment for \$150 against the defendant in favor of the warrantors be reversed, and that in other respects the judgment appealed from be affirmed; the warrantors to pay costs of appeal.

No. 4581.

JOHN SEVIER v. SUCCESSION OF JAMES G. GORDON.

A rule against an executor or a succession can not be taken after the succession has been closed and the executor has been discharged, nor can an order to sell succession property be granted after the heirs have been in possession subsequently to a partition among themselves.

APPEAL from the Probate Court, parish of Tensas. *Cordill, J. T. P. Farrar & L. V. Reeves*, for plaintiff and appellee. *Drake & Garrett* and *W. B. Spencer*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. The plaintiff having a judgment against the succession of James G. Gordon, took a rule against the former executor of the will of said Gordon and the heirs to show cause why the property of the succession should not be sold to satisfy the judgment in the suit of *J. V. Sevier v. George Sargent et als.* We have decided that the succession of Gordon had been closed, that the executor had been discharged and his bond canceled, after having turned over to the heirs at law the property of the succession. A rule against the executor or the succession could not be taken after the succession had been closed and the executor had been discharged; nor could an order to sell succession property be granted after the heirs had been put in possession after a partition among themselves. The proceedings in this case are unauthorized by law.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment dismissing the suit at plaintiff's costs.

No. 4524.

EMMANUEL LOEB & Co. v. A. BLUM. J. G. SPOR and JULIUS KRAFTS,
Third Opponents.

Where the vendee was put in possession in Germany of a certain quantity of wine which he had bought in that country and that possession continued across the Atlantic ;
Held—That the vendor's privilege could not be stretched so far as to extend from the banks of the Rhine to the banks of the Mississippi, and be made to last during a voyage from one continent to the other.

A consignee's privilege can not prevail against the seizure made by judgment creditors, if not recorded prior to the seizure.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Barrow & Pope* and *Thomas J. Cooley*, for plaintiffs and appellants. *Fuqua & Calliham*, for third opponents and appellees.

Justices concurring: Ludeling, Taliaferro, Morgan, Howell.

MORGAN, J. Blum purchased eight casks of wine from Krafts. The purchase was made in Germany. The price was to be paid, part cash and part on credit. The wine was consigned to Spor.

Loeb & Co., judgment creditors of Blum in the sum of \$324 98, issued execution directed to the sheriff of the parish of Orleans, who seized the wine above referred to in the hands of Spor, the consignee, and Casey, the collector of the port. The wine was sold by the sheriff and produced \$891 80.

Before the sale, Spor, by third opposition, claimed to be paid the amount of his advances for freight, duties, brokerage, etc., amounting to \$393 66 by preference over the seizing creditor.

Krafts also intervened and claimed his vendor's lien and privilege on the property seized, for the amount remaining due to him, \$520, and asked to be paid that amount in preference over Loeb & Co.

There was judgment in favor of Spor for the amount claimed by him; and then in favor of Krafts for \$520, with interest from November 21, 1871; Loeb & Co. to receive the balance if any remained.

From this judgment Loeb & Co. have appealed.

A motion to dismiss the appeal is made on the ground that the amount in controversy does not come within the appellate jurisdiction of this court. The motion can not prevail. Krafts' claim exceeds five hundred dollars, and this is sufficient to give us jurisdiction. Besides, the sum to be distributed between the contestants largely exceeds that sum. 21 An. 487.

On the merits, we think there is error in the judgment appealed from.

The wine was purchased in Germany. To stretch the vendor's privilege from the banks of the Rhine to the banks of the Mississippi, and to make it last during a voyage across the Atlantic is, we think, carrying the "*cælum, non animum, mutant, etc.*," doctrine too far.

 Loeb & Co. v. A. Blum.

The property went into the possession of Blum when he purchased it; it was shipped, as his property, to Spor, his consignee, and when it landed at this port it was liable to be seized by his judgment creditors. It may be true, as contended, that, by the commercial law, the vendor might have protected himself, but we apprehend that he could only have done so in case of the insolvency of his vendee, and by seizing the goods *in transitu*; and this before the goods had been reduced to the possession of the vendee. In this case, Bloom's possession of the wine occurred in Germany, and continued across the ocean, and Krafts never pretended to exercise any right over it until long after it had been seized by Loeb.

As between Spor, the consignee, and Loeb & Co., the latter, as seizing creditors, are to be paid first. Assuming that Spor has the privilege which he claims, but with regard to which we do not consider it necessary to express any opinion, still it was not recorded prior to Loeb's seizure and can not, therefore, prevail against it. 23 An. 270.

It is therefore ordered, adjudged and decreed that the judgment of the district court, in so far as it relates to the claim of Loeb & Co., be avoided, annulled and reversed, and that there be judgment in favor of Loeb & Co. and against Spor and Krafts, third opponents, commanding the sheriff of the parish of Orleans to pay to the said Loeb & Co. out of the funds now in his hands, proceeds of eight casks of wine seized and sold herein by virtue of the *fi. fa.* issued in this case, the sum of \$324 98, with eight per cent. interest from April 23, 1867, and fourteen dollars and sixty cents costs, by preference and privilege over the said Spor and Krafts; and that in other respects the judgment be undisturbed; the costs to be paid out of the proceeds of sale.

 No. 3449.

FELIX A. DUCROS, Testamentary Executor, v. EDWARD GOTTSCHALK.

Where the defendant was sued for two mortgage notes left with him on deposit, and required to restore them or pay the full amount thereof;

Held—That defendant disclaiming any ownership of said notes and having no personal interest in them, has no defense to set up for himself, and has no right to plead one for a third party and ask the court to pass upon a question that would not be binding if decided for or against that person.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Louis Castera* and *M. E. Livaudais*, for plaintiff and appellee. *Saucier & Michinard*, for defendant and appellant.

ON MOTION TO DISMISS THE APPEAL.

Justices concurring: Taliaferro, Howell, Wyly, Howe.

HOWE, J. The plaintiff has moved to dismiss this appeal taken by the defendant, on the ground, as stated in the motion, "that no appeal

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lies from any judgment which does not produce an irreparable injury."

The judgment appealed from is a final judgment in the cause against the defendant. It was neither confessed nor has it been voluntarily executed. The amount in dispute exceeds five hundred dollars. We see no reason to deny the defendant the right of appeal, or anything in the proposition quoted from the motion to dismiss which deprives him of such right.

Motion denied.

ON THE MERITS.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The defendant, who was sued for two mortgage notes left with him on deposit, appeals from the judgment requiring him to restore them to the plaintiff or pay the full amount thereof. It appears that the defendant was the notary who passed a deed from J. B. St. Amand to Frank Michinard, on fifteenth October, 1859, for a tract of land, a sawmill and some other property situated in the parish of St. Tammany, and that the two notes in controversy were executed in evidence of part of the price. It also appears that these notes were left on deposit in the hands of the said notary during the life time of St. Amand, whose succession is represented by the plaintiff, and that since his death the said depositary refuses to restore them.

In answer to the demand, the defendant alleges that the notes were left with him on deposit by St. Amand and Michinard, there to remain until St. Amand should furnish to said Michinard a detailed statement of the advances made by him for the sawmill, and until the said Michinard had reimbursed said advances to said St. Amand; after which the said notes were to be delivered to said Michinard. "Defendant disclaims any ownership of said notes, but avers that long previous to the institution of this suit said Michinard had lodged in his hands a written notice to comply with the terms of deposit aforesaid."

The defendant excepted to the ruling of the court in refusing to allow him to prove the alleged stipulation in the contract of deposit in favor of Michinard. In this we think the court did not err, because having disclaimed any ownership of the notes, the defendant disclosed no interest in setting up such a defense, and he ought not to have been heard proving a defense which concerned Michinard alone.

Whatever right, if any, Michinard may have to the notes, shown by the notarial act to belong to the testator, can not be determined in this suit, because he is not a party. But the defendant suggests that it is not his duty to make parties, that this is plaintiff's duty. To this the reply is, that a defendant who has no defense to set up for himself, has

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no right to plead one for another person, and ask the court to pass upon a question that would not be binding if decided for or against that person. It would be idle to hear evidence and entertain the defense of a party not before the court, and who would not be bound by the decree. The notarial act drawn by the defendant shows that the notes belong to the testator, and it is conceded that the defendant has not the shadow of a title to them.

The judgment of the court below is correct, and the appeal is frivolous. We can not impose damages, however, because they have not been asked by the appellee.

Judgment affirmed.

Rehearing refused.

 No. 2874.

FORTUNE AVEGNO v. LAWRENCE HART.

When a driver attempts to pass another on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Koontz & Elliott*, for plaintiff and appellee. *Hornor & Benedict*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Morgan, Howell.

MORGAN, J. The thoroughfares of the city of New Orleans were never intended for race courses.

The plaintiff, driving on Canal street, was run into by the defendant, who was racing with a competitor, and, with his companion, was thrown from his buggy, which was badly damaged, and he and his friend much disturbed thereby in mind and body.

He sued the defendant for \$400 special damages, and for \$500 damages to his feelings. The judge gave him a judgment for \$350, and the defendant has appealed.

Avegno seems to have been about the middle of the street. Janny and Hart were racing behind him, and seem to have been close together, Janny somewhat ahead. Janny passed Avegno on the left; Hart attempted to pass him on the right. This was not Hart's proper place.

We understand the law of the road in this country to be that when a driver attempts to pass a vehicle which is going in the same direction with himself, he must go to the left; when they meet, each must go to the right. So well is this rule understood that horses, well trained, are governed by it without any guiding. It is established in

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this case, that plaintiff's horse is in the habit of going to the right. And so it would appear that Avegno, when Janny passed him, pulled to the right. This was proper for him to do; and it was most natural that he should, for he could well take it for granted that Janny's competitor, who was close behind him, would follow in Janny's track, and he was certainly justifiable in endeavoring to get as far out of the way of these reckless drivers as possible.

Besides, we take it that when a driver attempts to pass another on a public road, he does so at his peril: at least, that he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself. In this case, instead of being reckless or careless, the plaintiff did everything he could to protect himself from harm—and all without success. The defendant has no one to blame but himself, so much so that if the plaintiff had asked for it, we would have increased the damages. As it is, we can only affirm the judgment.

Judgment affirmed.

No. 4556.

A. D. COCO v. T. F. THIENMAN et als.

A record is not defective because certain documents were omitted which had been offered to prove a fact admitted in said record. There was therefore no necessity to copy them in the transcript.

Where the motion to dismiss the appeal is on the grounds that the sheriff who is party to the suit is not a party to the appeal, and that the sureties to the injunction bond are not parties to the appeal as they did not sign the appeal bond;

Held—That these grounds are not valid, because the appeal having been taken by motion in open court at the time when the judgment was rendered, all who are not appellants are appellees in the case.

Where a piece of property was bought at a tax sale, the deed for it made out by the sheriff and duly recorded in the office of the recorder of the parish, and said property was seized by a creditor of its former owners, who treated the tax sale as an absolute nullity, and who, being enjoined by said purchaser, proposed in the injunction suit to attack the title by showing irregularities and defects in the proceedings preceding the tax sale;

Held—That on its face the title of the purchaser is regular, that he is in possession under a recorded title, that by a special provision of the constitution, article 118, the deed of sale is *prima facie* evidence as to the title, that it is declared valid by section 59 of the act of 1872, No. 42, and that for these reasons the injunction must be maintained.

APPEAL from the Seventh District Court, parish of Avoyelles. *Butler, J. Irion & Thorpe*, for plaintiff and appellant. *Edwards & Ducote*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. A motion to dismiss the appeal has been made, on the following grounds: That the record is defective, a part of the evidence offered, not being in the transcript; that the sheriff, who is a

Coco v. Thienman et als.

party to the suit is not a party to this appeal ; and that the sureties to the injunction bond are not made parties to the appeal as they did not sign the appeal bond.

The fact, to prove which the documents omitted were offered, is admitted in the record—there was no necessity therefore to copy them in the transcript. The appeal was taken by motion in open court at the term when the judgment was rendered. All who are not appellants are appellees in this case.

ON THE MERITS.

A tract of land was purchased by Coco, the plaintiff, at a tax sale in February, 1872. The sheriff made a deed for the property in favor of Coco, and the deed was duly recorded in the office of the recorder of the parish.

On the sixth of August, 1872, Thieneman, who had obtained a judgment against Moreau, individually and as tutor to his minor children, caused the property bought at tax sale by Coco to be seized as the property of Moreau and of his children. The property had been sold to pay the taxes due by Moreau individually and as tutor. Coco enjoined the sale on the ground that the property belonged to him. Thieneman, on the other hand, treats the tax sale as an absolute nullity by seizing it as the property of Moreau and his children ; and he proposes in this suit to attack the title of Coco by showing irregularities and defects in the proceedings preceding the sale. On its face the title of Coco is regular—he is in possession under a recorded title ; and the constitution declares “ all deeds of sale made, or that may be made, by collectors of taxes, shall be received by courts in evidence as *prima facie* valid titles.” Article 118.

And the act of 1872, No. 42, declares that “ the tax collectors shall be and they are hereby authorized to give a title, in the name of the State of Louisiana, to all persons purchasing property sold in pursuance of this act, and such title shall be held and recognized by all courts in this State as valid in law.” Section 59.

It is not disputed that the taxes were due and that the property was sold to pay said taxes ; and it appears that Coco, the purchaser, holds the property under a title from the tax collector. Under the constitution and the act above recited this title can not be treated as a mere nullity. The injunction should have been maintained.

It is therefore ordered and adjudged that the judgment of the lower court be reversed and set aside, and that the plaintiff have judgment perpetuating the injunction, and for one hundred dollars damages and for costs against the defendants, *in solido*.

Rehearing refused.

State ex rel. Morgan v. Kennard.

No. 4499.

STATE ex rel. P. H. MORGAN v. J. H. KENNARD.*

The provisions of the federal constitution relative to juries in civil cases refer only to trials in the federal courts, and not to those in the State courts.

The fourteenth amendment of the constitution of the United States does not make any change on the subject of jury trials in civil suits.

The proceeding by rule is not new under the laws of this State, and whenever the Legislature authorizes it, that summary form of remedy may be adopted by litigants, and the want of citation or notice can not be pleaded by defendant. The delay allowed to answer would undoubtedly be extended by the court, on proper application, if insufficient.

The State law of January 13, 1873, merely provides a more speedy remedy for the settlement of contests for judicial offices. It is not violative of section 1 of article 14 of the Constitution of the United States.

Should it even be admitted that the law authorizes the suit in the name alone of the party claiming an office, the fact that the State has joined with him in his demand, advocated by private counsel, does not invalidate the proceedings *Utile per inutile non vitiatur*.

Although this court has not the power to decide who are the members of the General Assembly, yet the judges thereof are bound to know what assemblage of men constitute the State Legislature, for they are bound to know what are the laws of the State, in order to adjudicate upon the rights of the litigants under the law.

The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason, therefore, to maintain that art. 61 of that instrument refers only to the regular or annual sessions of the General Assembly in relation to executive appointments.

A PPEAL from the Superior District Court, parish of Orleans. *Hackins*, J. *A. P. Field*, Attorney General, and *William H. Hunt*, for relator. *Semmes & Mott*, *Howe & Prentiss*, *John A. Campbell*, for respondent.

Justices concurring: Ludeling, Taliaferro, Howell.

LUDELING, C. J. On the sixteenth day of January, 1873, the following rule was filed:

"On motion of A. P. Field, Attorney General of the State of Louisiana, herein appearing upon the relation of Philip Hickey Morgan, a resident of the parish of Orleans, and upon suggesting and giving the court to understand and be informed, as follows, viz:

"That said P. H. Morgan was nominated by the acting Governor of the State to the Senate thereof to fill the office of Associate Justice of the Supreme Court of the State of Louisiana; that his said nomination was duly confirmed; that he was commissioned thereto on the fourth of January, 1873; that he has taken and subscribed the oath required by law; that he is entitled and empowered to execute and fulfill the duties of said office according to law, and to have and to hold said office, with all the powers, privileges and emoluments thereof. And on further suggesting that John H. Kennard, also a resident of said parish, unlawfully holds said office, and executes the duties

* The cases of *P. H. Morgan v. Kennard*, *Bonner v. Lynch*, *F. Collin v. J. W. Knoblock*, *J. W. Knoblock v. F. Collin* (consolidated); *Kemp v. Ellis*, are published here in a connected series, in advance and out of their regular order and place, at the request of the Executive, and also on account of their public importance.

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thereof, and claims the right to the office and to the powers, privileges and emoluments thereof, it is ordered that said John H. Kennard show cause on Saturday, January 18, 1873, at eleven o'clock A. M., why it should not be forthwith decreed and adjudged that he is unlawfully holding and exercising the duties of said office of Associate Justice of the Supreme Court of the State of Louisiana, and the said P. H. Morgan be decreed and adjudged entitled thereto."

On the day on which said rule was made returnable, the eighteenth of January, John H. Kennard filed the following exception :

" And now comes John H. Kennard, and excepts that there has been no citation issued herein, or served on him in this case, and prays to be hence dismissed with costs." The exception was overruled by the court *a qua* ; and then the defendant filed the following exceptions and answer, to wit :

" Now comes John H. Kennard, defendant in this suit, and excepts to the rule herein taken by A. P. Field, Attorney General, on relation of P. H. Morgan, on the ground that said proceeding by rule, in manner and form as set forth in said rule is not authorized by law, and further that the act of fifteenth January, 1873, entitled 'An Act to regulate proceedings in contestations between persons claiming a judicial office' as to its first section is unconstitutional and void, not being in conformity to the title of said act. And further, that said act is prospective and does not apply to pending litigation. And further, that said act in relation to sections two and three is unconstitutional, as it authorizes proceedings which amount to a denial of justice. And further, that if said act is to be construed as applicable to suits instituted prior to its passage, it is retroactive and void, as violative of article 110 of the constitution.

In case these exceptions be overruled, and not otherwise, for answer to said rule this respondent avers that he was duly appointed by the Governor of this State to the office of Associate Justice of the Supreme Court of the State of Louisiana on the third of December, 1872, vice W. W. Howe, resigned, during the recess of the Senate, and that on the same day he was duly qualified and took possession of said office, having complied with all legal requirements, and his term of office has not yet expired."

The exceptions were overruled on the eighteenth of January, 1873 ; and the trial of the rule, which had been fixed for the eighteenth of January, 1873, was commenced, and was continued to Monday, the twentieth instant.

On the twentieth January the following amended and supplemental answer and prayer for jury was filed : " Now comes J. H. Kennard and for further answer prays for a trial by jury, and pleads that the said act of the Legislature, under which relator, P. H. Morgan, claims

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to proceed, is null and void, as violative of section one, article fourteen, of the Constitution of the United States, which forbids any State from making any law, which shall abridge the privileges and immunities of its citizens, and prohibits any State from depriving any person of life, liberty, or property, without due process of law, or to deny to any person within its jurisdiction the equal protection of its laws, and if said law is void, this court has no jurisdiction to proceed by rule in the manner and form as set forth in said rule."

The prayer for a jury was refused by the judge *a quo* on the grounds that it was made only on the twentieth of January, after the trial of the case had been commenced on the eighteenth and continued for trial to the twentieth, and because the act of the fifteenth of January, 1873, forbids it. The trial was concluded on the twentieth day of January and judgment was rendered in favor of the relator and against the defendant on the same day. The defendant has appealed.

During the course of the trial several bills of exceptions were taken to the rulings of the District Judge, which we will proceed to notice.

The first bill of exceptions is to the refusal of the prayer for a jury, on the ground that the defendant was entitled thereto under the constitution of the United States. It was decided by this court as early as 1818, that the provisions of the federal constitution relative to juries refer only to trials in the federal courts, and not to those in the State courts. *Maurice v. Martinez*, 5 Mart. 436. And in *Dobbs v. Hemken*, decided in 1842, this court said: "The claim of a constitutional right to a trial by jury in all controversies where the amount exceeds twenty dollars, has been so long settled by this court, that it is unnecessary to comment upon it now." 3 Rob. 126.

In the case of the *City Bank v. Banks et al.* Chief Justice Eustis said: "The trial by jury in criminal cases is guaranteed by the Constitution; in civil cases it rests with the Legislature alone, and they have provided that certain classes of cases shall be tried without the intervention of juries." 1 An. 419.

But even if the defendant had been entitled to a trial by jury, he had forfeited his right by not claiming it in time. Code of Practice, articles 494, 495; 2 An. 651, *Louisiana State Bank v. Ledoux et al.*; and 3 An. 198.

We do not think that the fourteenth amendment of the Constitution of the United States makes any change on the subject of jury trials in civil suits.

The plaintiff offered in evidence the following documents:

First—Extracts of the minutes of the executive session of the Senate of the State of Louisiana, held January 4, 1873.

Second—List of the Senate of Louisiana, certified by P. G. Deslonde, Secretary of State.

Third—An official notice in the New Orleans Republican, of December 9, 1872, on the fifth page thereof, being compiled returns signed by John Lynch and others, returning officers, declaring certain persons elected Senators of the State of Louisiana.

Fourth—The record in the case of the State ex rel. Attorney General, etc., v. Jack Wharton and others, No. 18 of the Superior District Court.

To the introduction of each and every one of said documents the defendant objected on the ground that the evidence was irrelevant. The objection was overruled and the evidence was received. We are of opinion that the evidence was properly received.

The defendant alleged in his answer that he had been appointed, during the recess of the Senate, to fill the vacancy created by the resignation of Mr. Justice Howe, and "that the term of his office had not yet expired," claiming that under article sixty-one of the constitution his commission did not expire until "the end of the next session" of the Senate. It was pertinent, therefore, to prove that there had been a session of the Senate, and that that Senate had confirmed the appointment of the plaintiff. The fact that subsequently, during the adjournment of the court, the counsel for defendant did not question the fact there had been a Senate of the State of Louisiana in session, but contented themselves in simply contending that there had been but one session of the Legislature, which was still continuing, does not make the evidence offered less germane to the issues in this case. Nor is it a reason to reject the evidence that we might have taken judicial cognizance of the fact that there had been an extra session of the Legislature subsequently to the appointment of the defendant. Considering the technical objections which have been urged to prevent a trial on the merits of the case, it is not surprising that extraordinary prudence should have been exercised by the plaintiff in the introduction of evidence in support of his case.

We will notice the several exceptions urged against this suit. The first relates to the want of a citation. The form and manner of bringing litigants into court is a matter entirely within legislative control. Code of Practice, article 97, declares: "Civil actions may be prosecuted, according to the nature of the case, by three kinds of proceedings, to wit: ordinary, executory and summary." Article 98 declares that "the proceedings are ordinary when citation takes place, and all the delays and forms of law are observed. They are executory when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing confession of judgment, or in other cases provided by law.

"They are summary where carried on with rapidity, and without the observance of the formalities required in ordinary cases, as when

courts provide for the administration of vacant successions and the property of minors and absent heirs."

In the case of *City of New Orleans v. Elijah Cannon*, the defendant was sued for the city tax of 1853, and was cited under the thirty-fifth section of the consolidation act of 1852, which substituted, in lieu of petition and citation, the constructive service, by advertisement, of the tax bill in the official newspapers of the city. Mr. Justice Voorhies, being the organ of the court, held that such proceeding, in the absence of petition and citation, are not unconstitutional, and that "summary proceedings clearly fall within the term 'due process of law.'" 10 An. 764, 767.

In 11 An. 375, Chief Justice Merrick, as the organ of the court, said: "It is in the power of the Legislature to determine in what manner parties may be brought into court, and we have recently decided, in regard to city taxes, that a decree rendered upon such notice is obligatory." The proceeding by rule is not new under the laws of this State; and whenever the Legislature authorizes it, that form of remedy may be adopted by litigants. The delays allowed by the new law are in no sense in conflict with the constitution of the United States. The delay of one day to answer, if insufficient, would undoubtedly be extended by the court, if requested to do so. The Code of Practice provides that "when the defendant appears, he may pray for further time to answer, and the court may grant further delay if necessary for the purposes of justice." Art. 316.

The exception that the law of January 13, 1873, violates section one of article fourteen of the constitution of the United States is utterly without foundation. It merely provides a more speedy remedy for the settlement of contests for judicial offices. It is based upon sound considerations of public policy.

The maintenance of the rights of person and property, the preservation of the public peace, security and order depend upon the prompt, certain and uninterrupted administration of law. In order to secure such administration of the law, it is essential that those who exercise power should be clothed with unchallenged authority. For this purpose, no doubt, the Legislature of Louisiana passed the law, providing for a speedy trial and settlement of conflicting claims of persons to judicial offices. In *Rice v. De Buys*, this court said: "Necessity appears to require that the possession of the elective offices shall be determined without the delays of an ordinary law suit." 5 An. 398. In *Borgstede v. Clark* the court said: "But in this proceeding no appeal is permitted, no matter what may be the pecuniary value of the office. In the case of *De Buys* the constitutionality of this provision of the statute was debated. We sustained its constitutionality, and refused to entertain an appeal, because we considered the contest a

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matter of public concernment, and not a law suit between individuals." 5 An. 732.

Another exception to the mode of proceeding is that the suit should have been in the name of the claimant Morgan alone, and not in the name of the State, etc.

We deem it sufficient to state that Morgan is a party plaintiff with the State, and he has been represented by private counsel in both courts; if it be conceded, therefore, that the new law authorized the suit in the name alone of the party claiming the office, the State having been joined with him in his demand did not invalidate the proceedings—" *utile per inutile non vitiatur*." But see 5 Wheaton 291; Wallace v. Anderson, 5 An. 732; State ex rel. Wickliffe vs. Delassize, 12 An. 711.

The other exceptions are equally without foundation.

The title of the law does indicate sufficiently its object, and the law was not designed to have any retroactive effect.

The suit was instituted on the sixteenth of January, 1873, after the promulgation of the law in question, which was in operation, by the terms of the law, "from and after its passage."

On the merits, the question is, have the plaintiffs proved their demand; have they shown that P. H. Morgan was appointed and confirmed to the office of Associate Justice of the Supreme Court of the State of Louisiana? The public is concerned in knowing this fact.

To determine that question, it is necessary to know if his appointment was made by the Governor of the State, and if that appointment has been confirmed by the Senate of the State?

The appointment was made by P. B. S. Pinchback, who signs the commission as acting Governor of the State of Louisiana. Was he acting Governor of the State? We have no doubt of the fact. He was elected President of the Senate in December, 1871, after the death of Lieutenant Governor Dunn. As such he became Lieutenant Governor, during the unexpired term of Oscar J. Dunn. Section 1560 of the Digest of the Statutes of this State provides that "in case of the vacancy in the office of Governor, the Lieutenant Governor shall be Governor; in case of vacancy in the office of Lieutenant Governor, the Senate shall elect a president, who shall be Lieutenant Governor." Page 142.

The law does not say during his senatorial term, but that he "shall be Lieutenant Governor." If the Governor had died or resigned the day after, the Lieutenant Governor would have become Governor. Can it be pretended that under those circumstances the office of Governor would have become vacant by the expiration of the time for which P. B. S. Pinchback had been elected a Senator? We think not.

He was Lieutenant Governor when Governor Warmoth was im-

peached by the House of Representatives. During his impeachment the Governor was suspended, and the "powers and duties of the office devolved upon the Lieutenant Governor." Constitution of La., art. 53.

Was the Senate, which confirmed P. H. Morgan, the Senate of the State of Louisiana?

It was composed of persons, returned as elected, to the Secretary of State, by the returning officers recognized by this court to be the legal returning officers at the late election. Constitution, art. 45.

It was organized at the State House by those whose names had been furnished by the Secretary of State to the Secretary of the Senate, in accordance with the election law of this State; it was presided over by the Lieutenant Governor, and subsequently it was recognized by the acting Governor of the State, as a part of the General Assembly. It is tacitly admitted by the defendant that the body of men who confirmed the appointment of Morgan is the Senate, for he attacks a law, under which this suit is brought, enacted by the General Assembly of which this Senate forms a part, not on the ground that the act was not passed by the Legislature, but on the ground that the law violates the constitution of the State and of the United States.

Though we have not the power to decide who are the members of the General Assembly, yet, we, as judges, are bound to know what assemblage of men constitute the State Legislature, for we are bound to know what are the laws of the State, in order to adjudicate upon the rights of litigants under the law.

We are of opinion, therefore, that P. H. Morgan was duly appointed and confirmed Associate Justice of the Supreme Court, vice W. W. Howe, resigned.

But it is contended that during the recess of the Senate John H. Kennard was appointed Associate Justice of the Supreme Court, to fill the same vacancy, and that the term of his office has not yet expired. Article 61 of the constitution declares "the Governor shall have power to fill vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of the next session thereof, unless otherwise provided for in this constitution," etc.

We deem it unnecessary to decide, in this case, whether or not the commission of the defendant would entitle him to hold the office, after the appointment and confirmation of another person to the same office, until the end of the next session of the Senate; for, in this case, it is shown that a session of the Senate was held after the defendant's appointment was made, and that that session ended on the sixth day of January, 1873, and before the meeting of the regular session of the General Assembly. The language of the constitution seems too clear to admit of but one construction—"until the end of the next session

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of the Senate.” It is not denied that there was an extra session of the General Assembly convened on the ninth day of December, 1872; but it is contended that the constitution in article sixty-one refers to ordinary or regular sessions. The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason therefore to say that article 61 refers only to the regular or annual sessions of the General Assembly—and we can not construe article 61 in the manner contended for by the defendant, without interpolating the words regular or ordinary in the article—which, of course, we can not do. It is manifest from article 75 of the constitution that it was the intention of the framers of the constitution that the judges of the Supreme Court should be appointed by the Governor, “with the advice and consent of the Senate,” and article 61 provides for a contingency which might arise, but it limits the duration of the commission of the officer, appointed when the advice of the Senate could not be had, to the end of the “next session of the Senate,” during which session the Governor can, if he wishes, have the advice of the Senate. This limitation was a restriction upon the power conferred upon the Governor *ex necessitate rei*.

There is no merit in the defense.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

HOWELL, J., *concurring*. In addition to the reasons given by the Chief Justice in this case, in which I concur, I desire to say that the right or title of either party to the office in controversy is fixed and governed by the Constitution of this State, and is in no manner dependent on, or affected by, the act approved fifteenth of January, 1873, which simply relates to the form of proceeding in certain cases, and if it should be unconstitutional in any or all of its provisions, we would still, I think, under our Constitution and laws, have the power to say who is *prima facie* entitled, without a judicial investigation by an inferior tribunal, to a seat with us on the Supreme Bench.

The Constitution of the State provides that the Supreme Court shall be composed of one Chief Justice and four Associate Justices, a majority of whom shall constitute a quorum; they (the five) shall be appointed by the Governor, with the advice and consent of the Senate, for the term of eight years (article 75); when a vacancy happens during the recess of the Senate the Governor has the power to fill it by granting a commission, which shall expire at the end of the next session of the Senate (article 61); all commissions shall be in the name and by the authority of the State of Louisiana, and shall be

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scaled with the State seal, signed by the Governor, and countersigned by the Secretary of State (article 72).

Under these provisions the right of the plaintiff, P. H. Morgan, to a seat as Associate Justice of the Supreme Court, by virtue of a commission, showing his appointment by the Governor, with the advice and consent of the Senate, vice W. W. Howe, resigned, when he presented it (with an oath of office) after the expiration of the extra session of the Legislature convened on the ninth of December, 1872, was clear. The defendant's commission was issued under article sixty-one of the constitution, and by that article could have vigor, at the best, only until the expiration of the above mentioned session, which occurred before the plaintiff claimed his seat, and we could rightfully have admitted him, or rather could not rightfully have prevented him, had he insisted on taking his seat. His right *prima facie* at least was equal to that of either one of us. We are bound to know who compose the Supreme Bench, and we knew the rights of these parties before this suit as well as we do now.

But as each member of the Supreme Court must be appointed by the Governor, with the advice and consent of the Senate, for the constitutional term, it follows, in my opinion, that a commission in due form, showing that an appointment to fill an unexpired part of such term has been made, with the advice and consent of the Senate, is, at least, *prima facie* evidence of the right to the immediate possession of such office, whether the session of the Senate had expired or not at which such appointment had been confirmed. The appointment by the Governor without the aid of the Senate is in its nature and essence provisional only, and is necessarily and immediately superseded by a subsequent appointment made with such aid, it being the mode of appointment specially provided by the constitution for the Supreme Court.

In my opinion the defendant has, by his pleadings, clearly admitted the legality and validity of the authority under which the plaintiff, Morgan, claims the office of Associate Justice. He does not directly assail the commission issued to the plaintiff, the official capacity of those who signed it or the legality of the Senate which confirmed the appointment, or of the Legislature which enacted the law under which these proceedings were instituted. Yet as his exceptions and answer might possibly be construed in reference to plaintiff's allegations, so as to raise the question, I think it not inappropriate for this court to express an authoritative opinion thereon in this case. It is confirmatory of the pleadings and facts of the case.

No question is raised as to notice of the rule, service of which was made on defendant, else he would not have been in court.

I really can not see any reasonable ground of defense.

WYLY, J., *dissenting*. This is a contest for the office of Associate Justice of the Supreme Court. The proceeding is under act approved fifteenth of January, 1873, entitled "an act to regulate proceedings in contestations between persons claiming a judicial office." This act provides that if the incumbent shall refuse to vacate the office, the "person so commissioned shall have the right to proceed by rule. * * * Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately, without jury, and by preference over all other matters or causes depending in such court, and the judgment therein shall be signed the same day of rendition. That either party to such rule may take an appeal from the judgment thereon, but such appeal shall be applied for within one legal day from the rendition of the judgment on such rule, and shall be made returnable to the Supreme Court within two days. The appeal shall be taken up in the Supreme Court by preference over all other cases, immediately on the application of either party, and the judgment thereon shall become final after the expiration of one legal day, whether judicial or not."

This law was approved on the fifteenth day of January, 1873, and on the next day the plaintiff filed the following motion or rule which I copy verbatim :

"On motion of A. P. Field, Attorney General of the State of Louisiana, herein appearing upon the relation of Philip Hickey Morgan, a resident of the parish of Orleans, and upon suggesting and giving the court to understand and be informed, as follows to wit :

That said P. H. Morgan was nominated by the acting Governor of the State to the Senate thereof, to fill the vacancy of Associate Justice of the Supreme Court of Louisiana; that his said nomination was confirmed; that he was commissioned thereto on the fourth of January, 1873; that he has taken and subscribed the oath required by law; that he is entitled and empowered to execute and fill the duties of said office according to law, and to have and to hold said office, with all the powers, privileges and emoluments thereof;

And on further suggesting that John H. Kennard, also a resident of said parish, unlawfully holds said office and executes the duties thereof, and claims the right to the said office, and to the powers, privileges and emoluments thereof;

It is ordered that said John H. Kennard show cause on Saturday, January 18, 1873, at 11 o'clock, A. M., why it should not forthwith be decreed and adjudged that he is unlawfully holding and exercising the duties of said office of Associate Justice of the Supreme Court of the State of Louisiana, and the said P. H. Morgan be decreed and adjudged entitled thereto."

On the eighteenth of January, 1873, the defendant filed the following

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exception, to wit: "And now comes John H. Kennard and excepts that there has been no citation issued herein, or served on him in this case, and prays to be hence dismissed with costs."

On the same day the following exception and answer was also filed, to wit:

"Now comes John H. Kennard, defendant in this suit, and excepts to the rule herein taken by A. P. Field, attorney general, on the relation of P. H. Morgan, on the ground that said proceeding by rule in manner and form as set forth in said rule is not authorized by law, and further that the act of the fifteenth of January, 1873, entitled 'an act to regulate proceedings in contestations between persons claiming a judicial office,' as to its first section is unconstitutional and void, not being in conformity to the title of said act.

And, further, that said act is prospective and does not apply to pending litigation.

And, further, that said act in relation to sections two and three is unconstitutional, as it authorizes proceedings which amount to a denial of justice.

And, further, that if said act is to be construed as applicable to suits instituted prior to its passage, it is retroactive and void as violative of Article 110 of the Constitution.

In case these exceptions be overruled and not otherwise, for answer to said rule this respondent avers that he was duly appointed by the Governor of the State to the office of Associate Justice of the Supreme Court of the State of Louisiana on the third day of December, 1872, vice W. W. Howe, resigned, during the recess of the Senate, and that on the same day he was duly qualified and took possession of said office, having complied with all legal requirements, and his term of office has not yet expired."

On the same day, Saturday, January 18, 1873, these exceptions were overruled by the court and the case was continued for trial till Monday, the twentieth of January, 1873, on which day the defendant filed the following supplemental answer, to wit:

"Now comes J. H. Kennard and for further answer, prays for a trial by jury, and pleads that the said act of the Legislature under which the relator, P. H. Morgan, claims to proceed, is null and void as violative of section one, article fourteen of the constitution of the United States, which forbids any State from making any law which shall abridge the privileges or immunities of its citizens, and prohibits any State from depriving any person of life, liberty or property, without due process of law, or to deny to any person, within its jurisdiction, the legal protection of its laws; and if said act is void this court has no jurisdiction to proceed by rule in the manner and form as set forth in said rule."

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On the same day the prayer for trial by jury was refused, the case was tried and judgment entered up for the plaintiff. The defendant immediately took this appeal.

I have copied all the pleadings and noted the orders of court, because I differ with the majority of the court as to an issue upon which they pass, which issue I maintain is not raised in the pleadings; therefore all that the majority of the court say in reference to that point, to wit: the legality of the Pinchback government, is in my judgment a mere *obiter dictum*, and utterly without judicial effect. The evidence upon which the observation of the court on this point is based was excepted to by the defendant on the ground of irrelevancy. It being offered to prove an issue not raised by the pleadings, I think the exception was well taken and the evidence should not have been received. Having copied the pleadings I now copy the bill of exceptions, in order that it may appear whether the evidence excepted to was pertinent to the issues made up by the plaintiff and the defendant. It is as follows :

“Be it remembered that on the trial of this cause the defendant filed a prayer for a jury, as by the said prayer in the record will more fully appear; but the court overruled the said application, and refused to permit the defendant to have said jury, to which ruling the defendant then and there excepted, on the ground that he was thereto entitled by the constitution of the United States.

And be it further remembered that in the trial of this cause the plaintiff offered in evidence the following documents.

First—“Extract of the minutes of the extra session of the Senate of the State of Louisiana, held January 4, 1873,” and hereto annexed:

Second—“List of the Senators of Louisiana, certified by P. G. Deslonde, Secretary of State,” and annexed hereto.

Third—“An official notice in the New Orleans Republican of December 9, 1872, on the fifth page thereof, being compiled returns signed by John Lynch and others, returning officers, declaring certain persons elected Senators of the State of Louisiana,” and hereto annexed.

Fourth—“The record in the case of the State ex rel. Attorney General vs. Jack Wharton and others, No. 18 of the Superior District Court.”

And to the introduction of each and every one of said documents the defendant objected, on the ground that the same, and each of the same, were irrelevant thereto; but the court in each instance overruled the objection, and admitted said documents, severally, in evidence; and to said rulings, and each of them, the defendant then and there duly excepted, and reserves this his bill.

The prayer for jury was asked only on the twentieth instant, and

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after the case had been begun on the eighteenth and continued, and the court on this account and because the law was not deemed unconstitutional, denied the prayer.

Now what are the issues? It is alleged in the rule that on the fourth January, 1873, P. H. Morgan was duly appointed by the Acting Governor and confirmed by the Senate; that he has taken the oath of office, and is entitled to the possession of the office of Associate Justice; that J. H. Kennard unlawfully holds said office, and claims the right to exercise it, and also the privileges and emoluments thereof. Upon these averments it is asked that Kennard be decreed to be unlawfully holding said office, and that Morgan be adjudged entitled thereto.

To this the defendant has not pleaded the general denial. He simply excepts to the form of the proceedings; pleads the unconstitutionality of the act of fifteenth January, 1873, and alleges that on the third day of December, 1872, he was appointed to said office by the Governor, during the recess of the Senate; that he qualified and took possession thereof, and that "his term of office had not yet expired."

Under these simple issues what relevancy can be found for the introduction of a document containing a list of the Senators certified by Deslonde, Secretary of State; an extract from the New Orleans Republican showing the compiled returns signed by John Lynch and others, declaring certain persons elected Senators of the State; and the record of the case of the State ex rel. Attorney General v. Jack Wharton and others?

Why should this case be encumbered with such documents, which have no more relevancy to the issues presented by the parties than they have to any other law suit pending in any of the district courts of the parish of Orleans?

Indeed if these documents are pertinent to the issues of this case, then we had as well abolish the rule that proof may be refused for irrelevancy, that the plaintiff can not prove what he has not alleged.

The list of the Senators, the returns of John Lynch and others, and the case of Jack Wharton, have no more to do with the allegations of the plaintiff and the defendant in this suit, than the list of the jurors of the First District Court, the returns of the Presidential electors and any transcript that may be found in the clerk's office of the Supreme Court would have to do with it.

The defendant does not plead that the statute of the fifteenth of January, 1873, is void, for want of authority in its authors to act as members of the General Assembly; nor does he aver that the commission issued to P. H. Morgan is invalid because Pinchback had no authority to act as Governor; no such issues have been made by the pleadings.

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The questions are, is the act of fifteenth January, 1873, providing a remedy so summary, constitutional, and is the term of office of J. H. Kennard expired?

Believing that these are the issues presented in this case, I feel constrained to express my opinion that the observations of the majority of the court in regard to the late Acting Governor of the State, the organization of the General Assembly, and the legality of the late extra session thereof, are remarks not necessary to the decision of this case, and are merely opinions outside of the issues involved in this controversy, and therefore not obligatory.

I find that the first section of the act of the fifteenth of January, 1873, declaring that the commission is *prima facie* proof of the right of the holder to the immediate possession of the office, is not covered by the title: "An act to regulate proceedings between persons claiming a judicial office," and for that reason it is repugnant to article 114 of the constitution and void.

I find from the record that there was no citation, service of citation, or anything equivalent thereto; and that the defendant was not served even with a copy of the rule upon which this action is based. His exception on this ground was undoubtedly well taken.

Citation, or some notice equivalent thereto, is the foundation of the action; and a proceeding without it is utterly void, unless the defendant waives it and voluntarily enters an appearance. C. P. 206.

The act of fifteenth January, 1873, authorizing the proceeding by rule, does not dispense with the law requiring citation or notice. On the contrary, it declares that "such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hour hours, and shall be tried immediately without jury," etc. I understand from this statute that citation or notice of the rule shall be served, and that it shall be returnable within twenty-four hours from the time of service. This seems to be a fair interpretation of the statute, because it must be construed with reference to article 206, C. P., and other laws requiring notice of judicial proceedings.

If the law, however, requires the rule to be returnable within twenty-four hours from the time it is filed, and the trial to begin immediately, I think it contravenes the constitution of this State and the constitution of the United States, because a proceeding under it would practically deny the defendant of some legal right without due process of law. Due process of law implies a fair hearing before judgment. Cooley's Constitutional Limitations, page 353 et seq., and authorities there cited.

To be a fair hearing, there must be legal notice of the demand, and a reasonable delay allowed for preparing the defense.

In my opinion, the statute under which this rule is taken does not

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allow such delay. It authorizes a proceeding by which the defendant in this case is deprived of his legal right to the office of Associate Justice of the Supreme Court without due process of law.

The defendant is deprived of a legal right without citation or legal notice of the proceeding, and without reasonable delay to prepare and make his defense.

The statute as applied to this case, in my judgment, contravenes the constitution of this State and the constitution of the United States, and it is therefore void. On this ground I think the demand of the plaintiff should be dismissed.

On the merits I find that the defendant was duly commissioned as Associate Justice of the Supreme Court on the third of December, 1872, during the recess of the Senate; that he took the required oath of office and entered regularly on the duties thereof. He was appointed under Article 61 of the Constitution, which declares that "the Governor shall have power to fill vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of the next session thereof." * * * Article 17 declares that "the General Assembly shall meet annually on the first Monday of January." * * * Article 64 provides that the Governor "may on extraordinary occasions convene the General Assembly." * * * Now in order to ascertain whether the term for which the defendant was appointed has expired, it is necessary to determine the exact meaning of that part of Article 61 which says his term "shall expire at the end of the next session" of the General Assembly. Does it mean at the end of the next regular session or the end of the next extra session? Was that clause used in reference to Article 17 fixing the beginning of the regular sessions on the first Monday of January annually; or was it used in reference to Article 64, giving the Governor the right, on extraordinary occasions, to convene the General Assembly? I believe the clause was used with reference to the regular sessions provided for in the Constitution, and not in reference to such extra sessions as extraordinary occasions might demand; that Article 61 refers to the normal state of things and not to the extraordinary or abnormal. As the regular session, beginning on the first Monday of January, 1873, has not yet expired, I believe the term for which Judge Kennard was appointed, under Article 61 of the Constitution, has not expired, and, therefore, the action of the plaintiff is premature, and his demand should be rejected.

For the reasons stated I feel constrained to dissent in this case.

Writ of error to the Supreme Court of the United States, granted by Judge Bradley, and filed Feb. 5, 1873.

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No. 4655.

WILLIAM B. KEMP v. E. P. ELLIS.

The provisions of the act of the Legislature, No. 39, 1873, for transferring cases are not repugnant to articles 83, 90 and 114 of the State Constitution.

The Warmoth commissions that were issued before the general election returns were reported and promulgated by the returning officers of the State, are null and void.

The court will take judicial cognizance of that irregularity which renders the issuing of a commission null and void, as having been done in contravention of positive law.

A commission issued by the Governor must be recognized as having legal force, when it bears *prima facie* evidence of genuineness and validity, and nothing to the contrary is shown.

A PPEAL from the Superior District Court, parish of Orleans.
Hawkins, J. H. C. Dibble and E. F. Russel, for plaintiff and appellee. *J. H. Muse and T. & J. Ellis*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAERRO, J. William B. Kemp and Ezekiel P. Ellis contend for the office of District Judge of the Sixth Judicial District of the State. Each claims to be legally entitled to the office. Each claims to have been duly elected to that office at the general election held on the fourth of November, 1872, and each presents a commission purporting to have been issued under the authority of the State, but by different persons acting at different times as Governor of the State.

This proceeding was commenced in the parish of Tangipahoa, and what adds to the complications presented there are two persons claiming the office of Parish Judge of that parish, C. J. Bradley and J. W. Addison. The contestants for the office of District Judge severed in their recognition of a legal parish judge.

Kemp presented in that parish a petition addressed to the judge of the Sixth Judicial District setting up his title to that office and prayed that Ellis be cited to show cause why the petitioner should not be declared entitled to the office and to be inducted into it. Upon this petition he rendered an order recusing himself and referring the case to C. J. Bradley as parish judge for investigation and decision. This order was rendered on the tenth of February, 1873. On the second of January previously a suit was instituted in the parish of St. Helena, one of the parishes of the Sixth Judicial District, by the attorney of the District, against Kemp, praying that he be declared an usurper, and that Ellis be declared legally entitled to the office of district judge.

About the same time a similar action was brought in the parish of Tangipahoa against Bradley in the interest of Addison, claiming to be the lawful parish judge of that parish. This suit was brought in the District Court, and in pursuance of the prayer of the petition, Ellis acting as district judge, granted an injunction against Bradley, prohibiting him from discharging the duties of parish judge. In this state of affairs, on the eighth of March, Kemp filed in the Superior Court of

the parish of Orleans, an application under the act of the Legislature approved the fifth of March, 1873, numbered 39, to regulate proceedings in contestations between persons claiming judicial office, to have his case against Ellis transferred to that court.

An order was accordingly rendered by the Superior Court, addressed to Bradley as parish judge of Tangipahoa, directing him to transfer the case, which was accordingly done under an order rendered by him on the eighth of March, 1873. When the case was opened in the Superior Court, the defendant filed a motion to rescind the orders and proceedings under which the transfer of the case was made, alleging as grounds in support of this motion that the provisions of said act No. 39 for transferring causes is repugnant to articles 83 and 90 of the State constitution; that the plaintiff's order recusing himself and transferring the case to C. J. Bradley, as parish judge, was null and of no effect, because, by the plaintiff's own showing, he was not at that time the acting district judge of the district; that he could make no order in his own case affecting the rights of the defendant; that the legal parish judge of Tangipahoa was not incompetent to try the case; that C. J. Bradley was not at the time he made the order of transfer the acting parish judge of the parish of Tangipahoa, and could not take cognizance of the proceeding in any manner.

The defendant also excepted on various grounds to any action being taken in the case by the Superior Court. He alleges that that court has no jurisdiction *ratione materie* or *ratione personæ*, the parties and the subject matter being without the limits of the parish of Orleans, and that the act No. 39, of July 15, 1873, in that respect violates article 83 of the constitution; that it is in violation of article 114 of the constitution, as the different objects embraced in the act are not set out in its title; that it is an *ex post facto* law; that the same suit for the same object and between the same parties is now pending in the district court of the parish of St. Helena, and he therefore pleads *lis pendens*. In his answer to the merits, the defendant alleges that at the general election held on the fourth of November, 1872, he was duly elected district judge of the Sixth Judicial District, and in pursuance thereof he was regularly commissioned by the Governor of the State, and qualified under that commission by filing his oath of office with George E. Bovee, Secretary of State.

On hearing the case in the court below the judge rendered judgment in favor of the plaintiff and the defendant has appealed. The exception taken by the defendant to the legality of the transfer of the cause will first be considered. Article 112 of the State Constitution provides that "the General Assembly shall provide by law for all change of venue in civil and criminal cases." The principle on which a change of venue is accorded, either in civil or criminal cases, is

grounded in considerations of public policy to secure to parties whose rights are at stake in legal controversies a fair and impartial trial. At the domicile of the parties it not unfrequently happens that partialities exists in the public mind in favor of one of the litigants and undue prejudices against the other. One of them through the advantages of wealth, family connections, popularity, or a predominance of political feeling, or some other adventitious circumstance, might have a controlling influence in his own vicinity which would place his adversary at great disadvantage in a contest with him at law. Hence a party litigant on making a declaration under oath that, from any sufficient cause specially set forth he fears he would be unable to obtain a fair trial, may obtain a change of venue. Revised Statutes, p. 760. The act No. 39 of March 5, 1873, to obviate the difficulties that would ensue from an inability arising from any cause to obtain a decision of a controversy for a judicial office, provides against such a contingency. Section third of that act provides that "in case of recusation or inability from any cause whatever the judge or judges of the parish or district wherein the persons so contesting shall reside shall be unable to act, then and in that case the plaintiff in said rule may take said rule before the judge of the adjoining parish or judicial district, or to the Superior Court at New Orleans, as he may deem advisable, and in cases now pending in which contestation between persons claiming judicial office is the subject matter at issue, either party shall have the right to have his cause removed to the adjoining parish or judicial district, or to the Superior Court at New Orleans, upon application to the judge of any adjoining parish or judicial district, or Superior Court at New Orleans, and affidavit of the recusation or inability of the judge to act from any legal cause, and upon the party filing said application and affidavit, the court shall by order direct the removal of such cause, and the record shall thereupon be transferred to the said court; and in case of inability on the part of the party applying to obtain said record, or a duly certified copy thereof, sworn copies of the record may be filed with the court, and the case shall thereupon be tried in same manner as if the original record was with the court; provided, that before any case so removed at the instance of any party shall be proceeded with, the court making the removal shall require that the adverse party shall have twenty-four hours' notice, with an additional twenty-four for every ten miles his place of residence may be from the court."

The plaintiff, as we have seen, filed a suit in the District Court of the parish of Tangipahoa, in the Sixth Judicial District, on the tenth of February, 1873, setting up claim to the office of district judge of that district. He brought this action under the act No. 39 of fifteenth of January, 1873. He entered an order recusing himself, and referred

the matter for decision to C. J. Bradley, as parish judge of the parish of Tangipahoa. A suit under the intrusion act had previously been instituted in the interest of Addison, claiming the office of parish judge of that parish, and in that suit Ellis had rendered an order on the third of January, 1873, granting an injunction prohibiting Bradley from discharging the duties of parish judge of the parish of Tangipahoa. This fact was alleged and sworn to by the plaintiff in his motion before the Superior Court to have the cause transferred to that court. He might have had, for aught that appears, valid objections to having the case instituted against him under the intrusion act in the interest of his competitor, tried before the parish judge of the parish of St. Helena; at all events that suit did not prevent him from resorting to a different form of action in his own case, and that form which is specially presented by law for the decision of contestations for judicial offices.

Each of these contestants charges that the other is devoid of legal right to the office in controversy.

Kemp sets forth in his petition that the defendant, Ellis, "assumes to exercise the duties and functions of district judge of the said Judicial District of Louisiana wrongfully, illegally and in contravention of the rights of this petitioner as herein set forth, pretending and claiming to be the judge of said district," etc.

In the intrusion suit of Ellis against Kemp it is alleged that "William Breed Kemp, of St. Helena parish, has unlawfully set up claim and title to said office, and has usurped and intruded into the same without the shadow of an honest or legal title." The petition prays that "he be decreed to be an intruder and usurper, and perpetually excluded from said office," etc. Each of the parties swears to the truth of the allegations in their pleadings.

The parish judge of St. Helena to whom the case of Ellis v. Kemp was referred, granted an order that an injunction issue as prayed for, restraining Kemp from acting or assuming to act as judge of said district.

We conclude that the plaintiff had the right to have the case transferred.

The next inquiry is had C. J. Bradley the right to render the order of transfer?

And now, under the confused state of litigation that appears to exist in that judicial district in relation to judicial offices, and the contradictory evidence we find in the record, to enable us to decide the question it becomes necessary for us to determine incidentally which of the two claimants of the office of parish judge of the parish of Tangipahoa had *prima facie* the right to render the order of transfer. Each of these parties, like the contestants for the district judgeship, presents a commission. The commission of Addison is dated December 4, 1872,

and was issued by Governor Warmoth. Bradley holds the commission of Governor Kellogg, dated twenty-fourth January, 1873. We have several times decided that the Warmoth commissions that were issued like the one in the present case, before the general election returns were reported and promulgated by the returning officers for the State, are null and void. Bradley, therefore, holding a commission, regular and legal on its face, must be considered as *prima facie* entitled to the office, and therefore that he had the right to render the order of transfer.

On the merits the case is to be disposed of under the provisions of the law enacted on the fifth of March, 1873, number 39. The question then is which of the contestants holds the legal and valid commission? The defendant's commission was issued by Governor Warmoth on the fourth day of December, 1872, before the general election returns had been officially made out and promulgated as required by law, and before he could legally issue a commission. The court, as was said in the case of *Collin v. Knoblock*, lately decided, will take judicial cognizance of that irregularity which renders the issuing of a commission null and void, as having been done in contravention of positive law.

The plaintiff holds the commission of Governor Kellogg, issued on the twenty-fourth of January, 1873.

This commission bears *prima facie* evidence of its genuineness and validity, and nothing to the contrary being shown, must be recognized as having legal force. The reasons assigned in the case of *Collin v. Knoblock* apply in the general to this case. It becomes unnecessary to pass upon the various bills of exceptions found in the record.

It is therefore ordered, adjudged and decreed that the judgment of the Superior Court be affirmed with costs.

WYLY, J., *dissenting*: This suit for the office of judge of the Sixth Judicial District was brought at the domicile of the defendant in the parish of Tangipahoa. It was subsequently transferred to the Superior District Court, parish of Orleans, and there was rendered the judgment in favor of the plaintiff which a majority of this court affirms.

The first question is, had the Superior District Court jurisdiction of the case?

If the jurisprudence of this State is settled upon any point, it is that a defendant must be sued at his domicile, as provided by article 162, C. P., except in the cases expressly excepted from the operation of that article. It has been repeatedly decided that the law alone gives jurisdiction, and the parties can not by consent supply the want of jurisdiction.

In the case of Watkins, 21 An. 258, there was a controversy for the office of judge of the Eleventh District Court, and the suit was brought before Judge Levissee, of the Tenth District Court. This court of its own motion dismissed the suit, because it appeared that Watkins' domicile was not in the Tenth District, parish of Caddo, but in the Eleventh District, parish of Claiborne; and this court held that because the judge of the Eleventh District Court was interested and could not try the case, it did not follow that the suit might be brought before the judge of the Tenth District Court; that article 90 of the constitution "has directed how a case may be tried when the judge of the court is interested."

This article directs that when the district judge is interested in the suit, he shall call upon the parish judge to try the case.

When, therefore, this suit was brought in the district court, parish of Tangipahoa, the district judge, who was interested, very properly entered an order recusing himself, and calling upon the parish judge to try the case. Thus far the proceeding was regular.

Subsequently, to wit: on the eighth March, 1873, the judge of the Superior District Court of the parish of Orleans granted an order requiring the transfer of the case to his court for trial, and in pursuance thereof Judge Bradley, the parish judge of the parish of Tangipahoa, who had been called by the plaintiff to try the case, ordered the transfer thereof, as required by the judge of the Superior District Court. The sole ground upon which the transfer was ordered was an averment in the motion and affidavit presented to the Superior District Court, "that the said E. P. Ellis, illegally assuming to be judge of the said judicial district, issued a writ of injunction, at the suit of one John W. Addison, against the aforesaid Bradley, parish judge, injoining and restraining him from hearing and determining said suit or proceeding instituted by this appearer against the said Ellis, as aforesaid, and that by reason of said injunction said Bradley, parish judge, is unable to act."

The law upon which the judge of the Superior District Court based his order is section three of act No. 39 of the acts of 1873.

That statute, however, only authorizes the judge of the Superior District Court to order the removal of a cause from the district wherein the parties contesting shall reside, upon the application and "affidavit of the recusation or inability of the judge to act from any legal cause."

* * * * Now the question is, was the parish judge of the parish of Tangipahoa unable to act by reason of the injunction referred to in the motion for removal of the cause? Was it in the power of Judge Ellis, the defendant in this suit, to issue an injunction or grant any order preventing the parish judge from trying this case? I think not. If Judge Bradley was the lawful parish judge, as the majority of this

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court decides, he had the right to hear and determine the controversy between the plaintiff and defendant for the office of district judge; and no order issued by either of the contestants could destroy the jurisdiction conferred on him by Article 90 of the Constitution. If Judge Bradley was not the lawful parish judge, Judge Addison was, and there was no injunction nor any pretext whatever to defeat his jurisdiction of the case. If it was not in the power of Kemp and Ellis by consent to give the Superior District Court jurisdiction of their case, as was expressly decided in the case of Watkins, how could they, or either of them, grant an order divesting the parish judge of the parish of Tangipahoa of the jurisdiction, expressly conferred by Article 90 of the Constitution. If the case of Watkins and the other decisions of this court on the same subject mean anything, they mean that the jurisdiction of the judge at the proper forum can not be defeated by any act or contract of the parties. At the time this case was transferred to the Superior District Court the parish judge of the parish of Tangipahoa alone had jurisdiction, and there was no legal cause rendering him unable to act. If Judge Bradley had jurisdiction to order the transfer of the cause to the Superior District Court, it was because he was the acting parish judge; he swears he was the acting parish judge, and if so why had he not jurisdiction to try the case, there being no recusation on his part nor any pretext for a cause of recusation.

In my opinion, a sound construction and indeed the obvious meaning of section 3 of act No. 39 of the acts of 1873 is, that the inability of the judge to act, rendering a removal of the cause necessary, is an actual inability, arising from "a legal cause," and not a sham or apparent inability arising, as in the case before us, from an absurd order issued by one of the litigants in the suit pending before the parish judge. There is no pretense that the plaintiff could not get justice before the parish judge of his own district, and this is not made a ground for the order of removal, even if it were a valid one, about which it is unnecessary for me to express an opinion.

The only law upon which the judge of the Superior District Court did or could base his order for removal is section three of the act No. 39 of the acts of 1873, which, in my opinion, as before stated, did not authorize his order, because there was no affidavit of the inability of the parish judge to act arising from a legal cause. But if there were doubts of this, there is no doubt in my mind that section three of said act is utterly void, because the provision thereof is not covered by the title of the act, as required by article 114 of the constitution. The title of act No. 39 of the acts of 1873 is "an act to amend and re-enact an act entitled 'an act to regulate contestations for judicial offices.'"

Section three provides for a change of venue or for the removal of

causes from one district to an adjoining district, or to the Superior District Court of the parish of Orleans in certain cases, and the object of this section is not mentioned in the title. It is repugnant to article 114 of the constitution and therefore void.

Section one of said act, providing what shall be *prima facie* evidence of title to a judicial office, is also void, because the object thereof is not set forth in the title as required by said article of the constitution.

Believing that the Superior District Court had no jurisdiction of the case, and that the judgment of a court without jurisdiction is an absolute nullity, I deem it unnecessary to enter upon an elaborate discussion of the merits of the controversy. I will state, however, some of the views which I entertain on the subject.

I do not consider that the question whether the Lynch Returning Board or the Wharton Returning Board was the legal returning board, has ever been decided on its merits by any court of this State, at least so far as it concerns the parties to that controversy, and so far as the question incidentally affects the parties to this suit. The case between these returning boards was decided in the Eighth District Court in favor of the Lynch Returning Board, but that court granted a new trial, and subsequently dismissed the suit without considering the merits, on the ground that the law under which said board or boards were organized was repealed by the approval by the Governor of the new election law. Neither of the parties to that suit appealed from that judgment, even if it be conceded that the case had finally been decided on its merits. Therefore, as between the contestants in that case, there was no judgment in favor of the Lynch Returning Board. It was A. P. Field, a third party, who alone appealed from that judgment, and as to him alone the judgment was reversed by the decision of the majority of this court. Both of the contestants being appellees in that appeal, of course there could be no reversal or change of judgment as to them.

Therefore, as to the returning boards, and as to all other parties, except A. P. Field, it has never been decided by any court in this State that the Lynch returning board was the lawful returning board. Indeed, the question has never been presented in a form that it could be considered, except at the first trial in the Eighth District Court, and the judgment rendered at that trial was set aside, as before said, by the judge of that court.

Plaintiff holds a commission from Governor Kellogg, issued on twenty-fourth January, 1873; and the defendant holds one issued by Governor Warmoth on fourth day of December, 1872.

There is no proof in the record that the returns of the November election had been canvassed by a legal returning board before either of these commissions issued. I think the majority of this court errs

in taking judicial notice that the election returns had been legally canvassed when Governor Kellogg commissioned the plaintiff, and they had not been legally canvassed when Governor Warmoth commissioned the defendant.

In the absence of proof to the contrary, I think this court is bound to presume that Governor Warmoth did his duty, and that the truth is, as recited in his commission to Judge Ellis, of the fourth December, 1872, that "at a general election held on the fourth day of November, 1872, in conformity with law, E. P. Ellis was declared duly elected district judge in and for the Sixth Judicial District." * * * Here is a recital in a commission issued by the Governor in the name and by the authority of the State of Louisiana, attested with the great seal of the State, and it stands uncontradicted by any proof in the record.

But it may be urged that the same recital is in the commission issued to Judge Kemp on the twenty-fourth of January, 1873. To this a sufficient reply is, that the first commission issued to an officer whose term of office, fixed in the Constitution, has not expired, is at least *prima facie* the best title to the office. It devolves upon the party presenting the second or a later commission to show affirmatively the invalidity of the title acquired under the first.

In this case the plaintiff has not introduced a particle of proof to invalidate the title of Judge Ellis to the office. He simply presents his commission and asks the court to presume that he is right and that his adversary is wrong; that the commission of Governor Kellogg is a *prima facie* title to the office, but that the prior commission issued by Governor Warmoth is not a *prima facie* title to the office. He has not proved that the returns had not been legally canvassed when the commission issued to Judge Ellis, nor has he proved that they had been legally canvassed when the commission issued to him. He shows no infirmity in the title of his adversary, but merely sets up a title of the same character and of a later date.

In my opinion the commission issued to Judge Ellis on the fourth day of December, 1872, was a *prima facie* title to the office; it was a title that authorized him to administer the office, at least until a better one was adduced; and that it devolved upon the plaintiff attacking this title to prove affirmatively the facts necessary to defeat the same.

Judge Ellis was the district judge at the time of the election, and was entitled, under Article 122 of the Constitution, to continue to discharge the duties of the office, if neither his adversary nor himself showed a valid title under the election of 1872.

There are several important bills of exceptions in the record taken by the defendant which the court has been urged to consider.

The defendant offered several witnesses to prove that the returns of

the election in the Sixth Judicial District were never in possession of the Lynch Returning Board. Also he offered the witness James Longstreet, who was a member of that board, to prove that they "did not canvass the legal returns of the election made by the supervisors of registration and election in the parishes of Washington, Livingston, St. Tammany, St. Helena and Tangipahoa, and to show that said returns of election from said parishes were never before or in possession of said board, and to prove that no legal quorum of said board was present or acted upon the returns of said election in and for said Sixth Judicial District, and that if any returns were made by them of said election in said Sixth District, and any declaration of the election of the plaintiff, that said returns and declaration were based upon *ex parte* affidavits, rumors and hearsay, and not upon any official returns." . . .

I think this testimony under the pleadings was admissible and the bills of exceptions were well taken.

It was certainly competent for the defendant to prove that the election returns of the Sixth Judicial District had never been canvassed by the Lynch Returning Board, and that said returns were never in their possession, as an offset to the pretensions of the plaintiff that he had been returned as elected by said board. This proof in no manner contradicted the official report of said board, because the same, if made, was not introduced in evidence.

The position of the plaintiff in this case is most extraordinary. He asks the court to presume that the legal returning board had not acted when Governor Warmoth commissioned the defendant, and that they had acted, and favorably to him, when Governor Kellogg commissioned him. He asks the court to presume that Governor Warmoth acted in bad faith and that Governor Kellogg acted in good faith in reference to the issuance of these commissions. He proposes to go behind the commission issued by Governor Warmoth to inquire whether it was based upon the report of the returning board, but he resists the proof of the defendant that his own commission was not based on the returns of the returning board.

Placing the merits of his case upon the presumed favorable report of the Lynch Returning Board, he offers no proof of their canvass and favorable report in his behalf, but resists, and succeeds in getting the court to exclude the testimony offered by the defendant to prove that no returns had been made from the parishes composing the Sixth Judicial District, and there was no canvass thereof by the Lynch Returning Board. He asks the court to take judicial notice that the Lynch Returning Board was the legal returning board; that they had received and canvassed the returns from the Sixth Judicial District, that they had reported in his favor and against the defendant, and that Governor Kellogg's commission to him was based upon this favorable report of

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the Lynch Returning Board. Besides all this he demands the exclusion of all the testimony offered by the defendant to disprove the presumptions which he claims in his favor, and to disprove the facts of which he contends this court must take judicial cognizance. In these extraordinary pretensions he was maintained by the judge of the Superior District Court and by the majority of this court.

With all due respect for the views of my learned associates, I feel constrained to differ with them in the conclusion to which they have arrived, and for the reasons stated I dissent in this case.

Rehearing refused.

No. 4635.

FRED. COLLIN v. J. W. KNOBLOCK. J. W. KNOBLOCK v. FRED. COLLIN. (Consolidated).

Under the intrusion into office act, it does not appear that authority was conferred upon the courts to go beyond an investigation of the titles set up by the contestants for the office in controversy.

A review of all the cases adjudicated by this court under the intrusion act will show, that, in every instance, not one will be found which depended for its solution upon the inquiry as to which of the contestants obtained the larger number of votes.

The adjustment and compilation of election returns, determining the number of legal and illegal votes cast for each candidate, declaring the result of an election and furnishing the successful candidate with the proper certificate, in short superintending and controlling all the details of an election belong properly to the political department of the Government.

It is only under the statutory provision of 1855, that courts can proceed, in relation to parish offices, and through the agency of juries, to supervise the counting of votes, correct calculations, purge the polls of illegal votes, ascertain and establish majorities. It is confined to cases where no commissions have issued.

The subject matter of proceedings under the intrusion act is widely different from that of the statute of 1855. In cases under the intrusion law, courts can not go beyond commissions legally issued.

No authority is delegated to the judiciary under the intrusion act, to discuss, modify or abolish the official returns of the regular State returning officers. Such a right can not be assumed as an implied power.

With the character of laws as being *odious*, or entitled to favor, courts have not to deal.

This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity.

APPEAL from the Fifteenth Judicial District Court, parish of Lafourche. *Bettie, J. Louis Bush, Clay Knoblock* and *John Billin*, for appellee. *J. L. Belden*, for appellant. *T. L. Winder*, as district attorney.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAFERRO, J. This is a controversy under the intrusion act for the office of parish judge of the parish of Lafourche, each of the contestants claiming to have been elected to that office at the general election held in November, 1872. Judgment was rendered in favor of Knoblock, and Collin has appealed.

Under the intrusion into office act, we do not find authority conferred upon the courts to go beyond an investigation of the titles set up by the contestants for the office in controversy. The time at which the law was enacted and the circumstances which required its enactment show clearly that it contemplated cases only where the parties held adverse muniments of title importing right in the holders to the office contended for, to cases where each of the parties held a commission, or where one of the litigants claimed by certificate of election and the other by appointment, exhibiting his commission and setting up the ineligibility of his adversary. The intrusion law was passed in October, 1868. Previous to and subsequent to that time persons were frequently elected to offices to which they were ineligible by reason of the disabilities then imposed by law upon them from having been active participants in the late rebellion. Others, claiming these offices under appointment and holding commissions as evidence thereof, could resort to this law to have these conflicting claims judicially decided. But the question in cases of that class was simply the eligibility of one of the parties and the validity of the other's commission. We think a review of all the cases adjudicated by this court under the intrusion act will show that in every instance the issues were as we have stated them, and that no case will be found which depended on its solution upon the inquiry as to which of the contestants obtained the larger number of votes. The adjustment and compilation of election returns, determining the number of legal and illegal votes cast for each candidate, declaring the result of an election and furnishing the successful candidate with the proper certificate; in short, superintending and controlling all the details of an election, belong primarily and properly to the political department of the government.

This court in the case of the State v. The Judge of the Second District Court, 13 Annual 90, Judge Spofford being the organ of the court, well remarked: "The contesting of votes is not a judicial function only so far as made such by special statute. Indeed, some may have gone so far as to question whether this is not wholly a matter of administration, which can not, with propriety, be referred to the judicial tribunals at all. At any rate it is clear that such tribunals can not usurp any greater control over this business than is specially imposed upon them by law. In the absence of a statutory authorization they are without jurisdiction of the matter *ratione materiae*."

The Legislature of this State did, by statute, in 1855, delegate to the district courts the power to decide through the agency of juries, contested elections in regard to parish officers. The jury in such cases has the right to determine which of the parties is entitled to the office, or to refer the matter again to the people to be settled by a new election. Revised Statutes, pages 279, 280, 281, 282. Under this statute

the court and jury are clothed with power to examine the grounds of the contestation, and go into all the details of the election necessary to ascertain which candidate received the majority of the legal votes polled at the election. But it is only under this statute that courts can proceed to supervise the counting of votes, correct calculations, purge the polls of illegal votes, and ascertain and establish majorities. It is confined to cases where no commissions have issued. It expressly requires that the contestation shall commence within ten days; that it shall be conducted summarily, and directs the withholding of commissions until the investigation may be completed and the result legally proclaimed.

The subject matter of proceedings under the intrusion act is widely different from that of the statute of 1855. In cases under the intrusion law courts can not go behind commissions legally issued. To determine the validity of a commission they can not under this act go beyond the returns and report of the legal returning officers for all the elections of the State. The returns made by a legal State Board and officially promulgated by that Board as the general returning officers for the State at large, constitutes the basis upon which the Governor is authorized to issue commissions. These returns are, by the act of sixteenth March, 1870, made "*prima facie* evidence in all courts of justice and before all civil officers until set aside, after a contest according to law of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected."

This *prima facie* evidence, it is provided, may be rebutted and set aside; but this, we apprehend, could only be done by proceedings under the statute of 1855. No authority is delegated to the judiciary under the intrusion act to discuss, modify or abolish the official returns of the regular State returning officers.

As we have already said, it is well settled that the judiciary have no warrant of authority to exercise jurisdiction in matters of elections unless it be expressly delegated by the co-ordinate branch of the Government controlling the political department, and no express authority is granted under the intrusion act to inquire into the correctness of election returns officially promulgated by the legal returning officers. Such a right can not be assumed as an implied power.

The act of 1870, numbered 100, approved March 16, 1870, is the general law under which the elections held at the general election in November, 1872, were conducted, and which controlled as to the formalities of revising and compiling the returns from every part of the State and the making and promulgating the final report.

It may be remarked here that in the case we have referred to in 13 Annual 90, it was held by Judge Spofford that out of the parish of

Orleans there was no law providing for a judicial scrutiny into the votes for any other than "parish officers."

With the character of laws as being odious or entitled to favor, courts have not to deal. If the statute of 1870 is liable to grave criticism it is no fault of the judicial tribunals. It is not for them to declare it infamous even if it be so. But it is their duty to give it effect as a law wherever its provisions apply.

Under the views we have expressed we conclude that in this action, under the intrusion act, the court *a qua* have improperly gone into the inquiry in regard to the details of the election held in the parish of Lafourche in November, 1872, and the correctness of the official returns promulgated by the returning officers for the State. The contest is therefore limited to the simple question of which of the contestants holds the legal and valid commission. Knoblock presents a commission issued by H. C. Warmoth, Governor, on the fourth of December, 1872. His competitor, a commission issued to him by P. B. S. Pinchback on the 17th of December, 1872. We take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission the official returns of the election had not been promulgated, and therefore that the issuing the commission was a nullity. The other commission is not liable to this objection and bears *prima facie* proof of its validity and must be recognized.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered and adjudged that there be judgment in favor of Frederick Collin; that he be decreed entitled to exercise the duties of the office of parish judge of the parish of Lafourche, and in that capacity to receive the salary and emoluments thereunto appertaining. It is further ordered that J. W. Knoblock pay costs in both courts.

WYLY, J., *dissenting*: Collin v. Knoblock, No. 4635; Franklin v. Allain, No. 4634; Nicol v. Webre, No. 4633; Comeaux v. Leblanc, No. 4632.—In each of these cases I dissent, for the reasons given in my dissenting opinion in the case of the State ex rel. J. M. Bonner v. B. L. Lynch, this day decided.

H. Franklin v. L. S. Allain, No. 4634; Charles Nicol v. L. A. Webre, No. 4633; L. Comeaux v. E. E. Leblanc, No. 4632. These cases from the Fifteenth Judicial District Court, parish of Lafourche, are similar to that of Collin v. Knoblock, here reported in full, and the reasons assigned for the decisions are the same. Mr. Justice Wyly dissenting.—REPORTER.

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No. 4647.

STATE ex rel. JOHN M. BONNER v. B. L. LYNCH.

25	267
48	830
48	849

The defendant having been returned by the legal returning board of the State as elected judge of the Fourth District Court of New Orleans, and upon that return the Acting Governor having issued a commission to him according to law, it can not be said that one holding an office under such a commission has intruded into, or unlawfully holds the office.

No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board.

The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General. *H. J. Grover, W. M. Randolph, John H. New*, for relator and appellant. *E. Filleul, H. C. Dibble and W. H. Cooley*, for respondent and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Morgan.

TALIAFERRO, J. This is a suit brought under the intrusion act, in the name of John M. Bonner, alleging that at the general election held in November, 1872, he was elected Judge of the Fourth District Court, of New Orleans, having received a plurality of the votes polled for that office, there having been three candidates, T. J. Cooley, B. L. Lynch, the defendant, and himself. That notwithstanding he was duly elected to said office and commissioned by H. C. Warmoth, Governor of the State, the defendant has intruded into and taken possession of the said office, and is unlawfully holding and exercising the duties thereof. He prays to be recognized as Judge of said Fourth District Court, and to be put into possession of the same; that the defendant be decreed an usurper of that office and his pretensions thereto be rejected and not allowed.

The defendant excepted to the proceeding taken against him by the relator on several grounds, among which are the following:

That the relator shows no cause of action; that the matters alleged are not of judicial cognizance; that the contesting of votes is not a judicial function, and the court is without jurisdiction *ratione materiæ*; that the statute under which the relator aims to proceed does not embrace his case; that he is therefore without a standing in court.

The defendant answered by a general denial. He alleges that he was duly elected to the office claimed by the relator, and returned elected by John Lynch, James Longstreet and George E. Bovee, the board of returning officers, and in pursuance thereof that he was duly commissioned by the Acting Governor, P. B. S. Pinchback.

The exceptions were sustained and the suit dismissed. The relator has appealed.

The relator shows a commission from Governor H. C. Warmoth,

dated the thirtieth of November, 1872. The defendant produces a commission from Acting Governor Pinchback, dated the sixteenth of December, 1872.

We decided in the case of *Kennard v. Morgan*, and again in the case of *Hughes v. Pipkin*, that the board of returning officers composed of John Lynch, George E. Bovee, James Longstreet and Jacob Hawkins, was the legal returning board of the State at the late November election. That board, it appears, returned the defendant, Lynch, as elected judge of the Fourth District Court of New Orleans, and upon that return the Acting Governor issued a commission to him according to law. One holding an office under such a commission can not be said to have intruded into or to unlawfully hold the office. But it is said that the returns are only *prima facie* proof of the results of the election. That is true. The question, however, as to the election of officers is a political question, and courts of justice have jurisdiction over them only so far as the political department may have authorized them to exercise jurisdiction. If there were no statute authorizing the trial of contested election cases before courts, they would be without authority to do so. 13 An. 90.

No statute conferring upon the courts the power to try cases of contested elections or title to office authorizes them to revise the action of the returning board. If we were to assume that prerogative, we should have to go still further, and revise the returns of the supervisors of elections, examine the right of voters to vote, and, in short, the courts would become in regard to such cases mere offices for counting, compiling and reporting election returns. The Legislature has seen proper to lodge the power to decide who has or has not been elected in the returning board. It might have conferred that power upon the courts, but it did not. Whether the law be good or bad, it is our duty to obey its provisions, and not to legislate.

The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that. It is alleged in the relator's petition that B. L. Lynch was returned as elected to the office of Judge of the Fourth District Court, and that he was commissioned by the Governor. Having no power to revise the action of the board of returning officers, we have nothing to do with the reasons or grounds upon which they arrived at their conclusion.

Admitting everything alleged in the petition to be true, it appears that B. L. Lynch was returned by the legal returning board as having been duly elected Judge of the Fourth District Court of New Orleans, and commissioned thereupon by the acting Governor of the State, and, therefore, it is shown that the petition discloses no cause of action.

For these reasons, and for those we have given more at large in the

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case of *Collin v. Knoblock*, just decided, we think the defendant entitled to judgment in his favor. It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

WYLY, J., *dissenting*. This is a suit brought by the Attorney General under the "intrusion act" in the name of the State, with John M. Bonner joined as plaintiff, against the defendant, B. L. Lynch, to exclude him from the office of Judge of the Fourth District Court, on the ground that he usurped, intruded into and unlawfully holds said office, and to have said Bonner declared entitled to said office and inducted into the same.

The petition alleges that Lynch is a usurper; that he claims to hold said office under color of a commission from acting Governor Pinchback, dated sixteenth December, 1872, based on what purports to be the returns of election held in the city of New Orleans on the fourth of November, 1872, and published in the *New Orleans Republican* of the fifteenth December, 1872, over the signature of John Lynch, James Longstreet and George E. Bovee, acting as a board of returning officers.

It further alleges that the said commission was issued to the said B. L. Lynch through error, and was based on incorrect returns of said election; that at said election B. L. Lynch was not elected by a plurality of the votes polled, but that John M. Bonner, who is joined as plaintiff in the action was; that the office of Judge of the Fourth District Court legally and of right belongs to John M. Bonner, and that he is the proper person to perform the duties and draw the salary of said office.

It alleges that the election that was held in the city of New Orleans on the fourth of November, 1872, was conducted in accordance with law and was free from violence, disturbance or undue influence of any kind; that at said election, John M. Bonner received 14,033 legal votes, B. L. Lynch 12,834 votes, and Thomas J. Cooley 9554 votes, and that John M. Bonner, having received a plurality of 1167 votes, was lawfully elected judge of the Fourth District Court for the parish of Orleans.

The petition then goes into details, and avers that four hundred and ninety-nine good and legal votes were deposited in the ballot box for John M. Bonner, but were not counted by the Supervisor of Registration and Commissioners of Election, and placed on the sworn lists and statements to be forwarded to the Governor and canvassed by the Returning Officers; that twenty-five of these votes were excluded from the count because the name of the co-plaintiff was misspelt or the initials not properly given, and four hundred and seventy-four ballots were excluded on the alleged ground that the number of the precinct or ward was not written or printed on the outside fold

thereof; that the absence of this formality did not authorize the Supervisor of Registration and the Commissioners of Election to refuse to count these ballots after they had been voted and placed in the ballot-box; that of the ballots thus excluded four hundred and seventeen were on what was known as the Duvigneaud Ticket, whereon John M. Bonner was the candidate for Judge of the Fourth District Court, and fifty-seven were on what was called the Haley Ticket; that the co-plaintiff is now entitled to have these four hundred and ninety-nine ballots counted and added to the other votes received by him. The Commissioners of Election and Supervisor of Registration further erred in counting and not excluding the ballots found in poll eight, of the Third Ward; that a simple inspection of this ballot box conclusively showed that it had been stuffed; that the proper affidavits and the requisite legal proof were made for the exclusion of this poll, and this poll should have been excluded from the count of votes and the final canvass by the Returning Officers; that by improperly including this poll eight of the Third Ward in the count and canvass, three hundred and forty-two votes were added to the number received by the defendant, B. L. Lynch, which should have been excluded altogether.

But that, leaving out the four hundred and ninety-nine ballots that were deposited in the ballot box for J. M. Bonner, and not counted, which should have been added to the vote received by him, and counting for B. L. Lynch the three hundred and forty-two ballots found in poll eight of the Third Ward, which should have been excluded and not counted, J. M. Bonner still received a plurality of the votes cast of more than six hundred.

The petition further alleges that the returns of election compiled by John Lynch, James Longstreet and George E. Bovee, and published in the New Orleans Republican of fifteenth December, 1872, are wholly incorrect and untrue; that by said returns B. L. Lynch is stated to have received twelve thousand nine hundred and forty-five votes, Thomas J. Cooley eight thousand nine hundred and seventy-two votes and J. M. Bonner twelve thousand five hundred and seventy-three votes. But this is not a true and correct compilation and canvass of the votes cast for these respective parties, according to the sworn list or statement made by the supervisors of registration; that the said Lynch, Longstreet and Bovee, acting as returning officers, arbitrarily and without authority of law neglected and refused to make a full and complete canvass of the votes cast, but without any proper evidence or just cause excluded from their returns the entire ballots of several polls which they refused to canvass.

The petition avers that the only poll out of the one hundred and fifteen, into which the precincts of the parish of Orleans were divided, for which there was legal cause for exclusion of votes was poll eight

Third Ward ; that the said Lynch, Longstreet and Bovee should have excluded from their canvass the votes of this poll, but did not; that there was no legal cause for the exclusion of the votes of any other poll, and that they did not have in their possession any legal evidence, such as would justify them in excluding from their canvass the votes of any other poll. These returning officers arbitrarily excluded from their canvass the ballots of certain polls in the Second, Third, Fourth and Twelfth Wards, and the petition gives the number of votes excluded and not canvassed in each of these and the other wards.

The petition also avers that John M. Bonner was appointed and duly commissioned on the thirtieth of November, 1872, as Judge of the Fourth District Court, vice Judge Théard, who had resigned; that he accepted said appointment and acted thereunder; that subsequent to said appointment Governor Warmoth became satisfied that the complainant, John M. Bonner, had received the plurality of the votes cast at the election for the office of Judge of the Fourth District Court, and issued a commission to him to that effect on the fifth of December, 1872; that these commissions were in due form, and that said Bonner was acting under the same when he was illegally and forcibly ejected from said office on the sixteenth of December, 1872; and that said B. Lynch has been usurping and unlawfully exercising the functions and drawing the salary of the office of Judge of the Fourth District Court since said date.

These are the averments of the petition.

In bar of the action the defendant pleaded the exceptions that the petition discloses no cause of action; that the matters alleged are not of judicial cognizance; that the contesting of votes is not a judicial function; therefore the court is without jurisdiction *ratione materie*; and that this suit is not authorized by the intrusion act, under which it was brought.

On these exceptions the case was dismissed in the court below, and it was brought to this court on appeal.

I have stated the averments of the petition fully, because the defense is that the petition discloses no cause of action.

Taking the allegations of the plaintiffs to be true (as we must in this trial) I think they show a good cause of action.

The law under which the suit was brought, to wit: act No. 156 of the acts of 1868, is remedial and should therefore be construed liberally.

But giving the statute the strictest construction, in my judgment, it fully covers the case presented for examination.

The purpose of the statute, as expressed in the title, is to provide a remedy against usurpations and intrusions into, or the unlawfully holding or exercising a public office or franchise." It authorizes a suit

to be brought by the Attorney General in the name of the State "when any person usurps, intrudes into, or unlawfully holds any public office."

It provides that service shall be made as in other civil suits, that "the answer shall be filed within legal delays, and such cases shall be tried in preference over all other cases, without being fixed for trial after issue joined." It authorizes the Attorney General to join as plaintiff the person interested, and "in addition to the statement of the cause of action he may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto;" and "if the judgment be against the defendant, and rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and otherwise complying with the requirements of law, to take upon himself the execution of the office; and it shall be his duty immediately thereafter to demand of the defendant in the action all the books and papers pertaining to said office."

It occurs to me that nothing is plainer than that the law authorizes the suit now before the court; that it expressly provides the remedy which the plaintiffs seek in their petition. If all the allegations of the petition be true, (and such must be conceded on the trial of these exceptions,) B. L. Lynch is unlawfully holding the office of Judge of the Fourth District Court, and John M. Bonner is "rightfully entitled" to the same. The law expressly authorizes the inquiry raised in the petition whether Lynch or Bonner is "rightfully entitled" to the office. This rightfulness depends not upon the question who holds the certificate of the Board of Canvassers, but upon the question who was elected by the people. The constitution requires the district judges to be elected; and if Lynch in fact was not elected, although holding the certificate of the Returning Board, he is not rightfully entitled to the office and is unlawfully holding the same."

"A person derives his title to an office by his election, and not by his commission; and if he holds and exercises the functions of an office without having been legally elected, it is an unlawful holding, and he may be ousted at the instance of the State notwithstanding his commission." *Bashford v. Barstow*, 4 Wis., 567; *State ex rel. Attorney General v. Steers*, 44 Missouri, 223.

In order, therefore, to determine who is rightfully entitled to the office, it is necessary to look behind the certificate of the Returning Board, because the allegations (which must be taken as true) are, that the canvass was illegal, that the certificate is untrue, and that Bonner received, at least, six hundred more legal votes than Lynch and was actually elected.

Now, the important question is, can the court look beyond the cer-

tificate of the Returning Board? If we can not, there is an end of the case; if we can, the peremptory exceptions must be overruled and the case remanded to the lower court for trial on the merits. As far as my examination extends all the authorities seem to agree that the duties of the Returning Board or the Board of Canvassers are ministerial and not judicial; and such being the case, the legality of their canvass can be examined into by the courts.

Mayo v. Freeland, 10 Mo. 629; *State v. Harrison*, 38 Mo. 540; *State v. Rodman*, 43 Mo. 256; *Ex parte Heath*, 3 Hill 42; *Bower v. O'Brien*, 2 Ind. 423; *People v. Hilliard*, 29 Ill. 413; *People v. Jones*, 19 Ind. 357; *Ballou v. York*, 13 Shep. 419; *Thomson v. Circuit Judge*, 9 Ala. 338; *People v. Kilduff*, 15 Ill. 492; *O'Farrel v. Colby*, 2 Minn. 180; *People v. Van Cleve*, 1 Mich. 362; *People v. Van Slyck*, 4 Cow. 297; *Morgan v. Quackenbosh*, 22 Barb. 72; *Disben v. Smith*, 10 Iowa, 212; *People v. Cook*, 14 Barb. 259; 4 Seld., S. C. 67; *Hart v. Harvey*, 32 Barb. 55; *Attorney General v. Barstow*, 4 Wis. 567; *Attorney General v. Eli*, 4 Wis. 420; *State v. Governor*, 1 Dutch 331; *State v. Clerk of the Passaic*, 1 Dutch 354; *Marshall v. Kerns*, 2 Swan 68; *People v. Pease*, 27 N. Y. 45; *Head's case*, 25 Ill. 325.

The intrusion law, as we have seen, authorizes the Attorney General to bring a suit, like the one at bar, "when any person shall usurp, intrude into, or unlawfully hold any public office or franchise;" and it permits the inquiry to be made, "who is rightfully entitled" to the office?

Here I think the law has given the plaintiffs in this case ample power to bring and prosecute this suit, because it clearly authorizes a suit of this character "when any person" shall "unlawfully hold any office" in this State.

With this law in force, can we say there is no relief for the plaintiff? I think not. With the strictest construction, the "Intrusion Act," in my judgment, furnishes the State ample means to oust the defendant, who is accused of unlawfully holding the office of Judge of the Fourth District Court, which accusation must be regarded as true for the purposes of this trial. But where do we find the law putting the frauds and the illegal canvass of the returning board beyond the reach of judicial inquiry? Where is the law authorizing it to disregard the will of the people and set up its own arbitrary decision, the correctness of which cannot be inquired into?

There is no such law to be found. If there were, the members of this board would be the masters, not the servants of the people. The only powers of this board are found in act No. 100 of the acts of 1870, the act creating it. This statute will be searched in vain to find the extraordinary powers claimed in behalf of this returning board. Not one word will be found in that law placing the illegal acts of that board

beyond the reach of judicial inquiry. On the contrary, after defining the duties of these ministerial officers the statute declares that: "The returns of the elections thus made and promulgated shall be *prima facie* evidence in all courts of justice and before all civil officers, until set aside, after a contest according to law of the right of any person named therein to hold and exercise the office to which he shall by such return be declared to be elected."

In the face of this language how can it be pretended that the returns of this board can not be set aside by the courts in a contest according to law?

Is not a suit under the "intrusion act" a contest according to law, by which the State can inquire whether any of her offices are usurped, intruded into, or unlawfully held?

In this proceeding the State simply proposes to inquire whether Lynch unlawfully holds the office of judge of the Fourth District Court, alleging that he did not receive a plurality of the legal votes cast, and therefore was not elected. Now, there is no doubt the "intrusion act" permits the State to make the inquiry and it authorizes the court to decide whether Lynch is "rightfully entitled" to the office; that is, whether he actually received a plurality of the legal votes cast.

The right of the State to recover in this case in no manner depends upon the strength of Bonner's title.

But under the law the Attorney General had the right to join him as plaintiff and set up in the petition a statement of his right to the office. Now, what is the attitude of the defendant in this case? By his exceptions he admits that he did not receive a plurality of the legal votes cast; he admits that he received the certificate of election by the arbitrary and illegal canvass of the returning board; that his commission issued to him through error; that Bonner was elected and is rightfully entitled to the office. But still he contends that in the face of all these admissions there is no law in Louisiana by which he can be ejected from the office he confessedly usurps and unlawfully holds.

If such were the case it would be a burning shame and a disgrace to Louisiana.

In my judgment the law is ample to give all the relief which the plaintiffs claim at our hands. In this opinion I am not alone, but I am supported by high authority, viz: the Supreme Courts of New York and California, where the same statute prevails. Indeed, our Legislature in 1868 borrowed the intrusion act from New York, copying it word for word, as will be seen by examining the second volume of the Revised Statutes of New York of 1852, page 554, paragraph 432.

Now when the Legislature borrowed the law, is it not fair to presume

it intended the law to be construed as its language plainly indicates its purpose to be, and as it was understood and interpreted by the Supreme Court of New York.

In the *People v. Pease*, 27 N. Y. 45, the court say: "An action is prescribed in the nature of a *quo warranto*, to determine as well the question of usurpation of the person in office as the claim of the person asserting his right thereto.

"In this action the determination disposes as well of the public interest as the private right. It is not of so much importance so far as the public is concerned, which of two claimants shall discharge the duties of an office; but the private right of an individual to the fees and emoluments of an office is properly and legitimately the subject of judicial cognizance, and to adjudicate upon this right it becomes essential to determine who was legally and duly elected or appointed to it, and who is entitled to discharge its duties and receive and enjoy its fees and emoluments. The provisions of the code, in reference to this action, are ample to cover and secure as well the interests of the public as the private rights of the parties. The determination of those rights necessarily leads to an investigation into the title of the claimant to the particular office, and such an investigation must result in a determination of the legality of the election. * * *

"And the certificate of the board of canvassers authorized to canvass the votes given for an elective office, is made evidence of the election of the person therein declared to be elected. But such certificate is only *prima facie* evidence of the title of the person receiving it, to the office therein mentioned. In all cases where the proceeding is by *quo warranto*, or in an action of that nature, it is held that such proceeding is instituted to try the right to the office directly, and it is competent to go behind the certificate, which would otherwise be conclusive, to ascertain the real facts of the case. (*The People v. Seaman*, 5 Delio 409; *People v. Ferguson*, 8 Cow. 102; *People v. Van Slyck* 4 Cow. 297; *People v. Wail*, 20 Wend. 12.) * * *

What is it that confers title to the office and the legal right to the reception of its emoluments? It surely is the fact that the greatest number of qualified voters have so declared their wishes at an election held pursuant to law. It is not the canvass or estimate, or certificate which determines the right. These are only the evidences of the right, but the truth may be inquired into and the right ascertained. When it is so ascertained, the legal consequences follow that the person usurping the office is ousted, and the person legally entitled takes the office and its fees. * * *

"It is urged, however, that the act of the inspectors, in receiving and depositing the ballot is judicial, and therefore can not be reviewed in this action. It is supposed that the contrary is satisfactorily

shown, and that the universal practice of the courts, in actions or proceedings like the present, where they have inquired into the very right of the case, refutes this assumption. In *The People v. Van Slyck* it was urged by the counsel of the defendant that the certificate of the determination of the board of canvassers was conclusive evidence of the election; that it could neither be impeached nor contradicted; that the authority exercised by the board of canvassers was judicial, and that if the Supreme Court had jurisdiction to review the determination of the board of canvassers, their reviewing power could only be exercised through the medium of a *certiorari*; and until reversed in this form it remains valid and conclusive, and can not be questioned by an information in the nature of a *quo warranto*. These views were repudiated by the court in that case, which held that the act of the canvassers was not judicial, but merely ministerial, and that the trial in *quo warranto* is had upon the right of the party holding the office. This doctrine was promulgated nearly forty years ago in this State, and has been acquiesced in and sustained in all cases, and it ought not now to be disturbed."

In *The People v. Holden*, 28 California 123, where the controversy was, under the intrusion law, for the office of county judge, the court say :

"It is first claimed by the appellant that the district court had no jurisdiction in the premises, and that the only remedy in cases like the present, is under the statute which prescribes the mode and manner of contesting elections. No proposition could be more untenable. It is true the act providing the mode of contesting elections confers upon any elector of the proper county, the right to contest, at his option, the election of any person who has been declared duly elected to a public office to be exercised in and for such county; but this grant of power to the elector can in no way impair the right of the people in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom, if it be made to appear that he is a usurper, having no legal right thereto."

"The two remedies are distinct, the one belonging to the elector in his individual capacity as a power granted, and the other to the people in the right of their sovereignty. Title to office comes from the will of the people, as expressed through the ballot box, and they have the prerogative right to enforce their will, when it has been so expressed, by excluding usurpers and putting in power such as have been chosen by themselves; to that end they have authorized an action to be brought in the name of the Attorney General, either upon his own suggestion or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds any public office, civil

or military, or any franchise within this State. See also *People v. Jones*, 20 California, page 50; *Searcy v. Grow*, 15 Cal. 117; *People v. Cook*, 8 N. Y. 67; *People v. Van Slyck*, 4 Cowan 297; *People v. Vail*, 20 Wend. 12.

Our intrusion act authorizes a proceeding in the nature of a *quo warranto*. And under this writ all the authorities agree that a usurper can be excluded from office, and to determine the question of usurpation the courts have ample power to go behind the commission and the certificate of the Board of Canvassers.

In *Carpenter v. Ely*, Fourth Wisconsin 420, where the controversy was for the office of district attorney, the court say: "The duties of these canvassing boards are in the main ministerial. *Attorney General v. Barstow*, 4 Wis. 567; *People v. Van Slyck*, 4 Cow. 322; *Ex parte Heath*, 3 Hill 42; *People v. Stevens*, 5 Hill 616. But perhaps the board of county canvassers might have canvassed the total vote, notwithstanding the informality in the return.

"Conceding, however, the county board decided correctly upon the facts before them, in this proceeding, we are bound to go back and rectify this mistake or omission and count the vote; for it is the election by a plurality of votes which constitutes the right to an office, and that can not be defeated by the mistake, negligence or misconduct of the canvassing boards." And the court held that the relator received a plurality of the legal votes cast for the office and "effect must be given to this election, notwithstanding the certificate of election had been given to the respondent. A canvassing board can not create a right to an office; that must be based upon an election."

In the *State v. Steers*, 44 Missouri, where the controversy was for the office of sheriff, the court say: "To determine upon the legality of votes is a judicial proceeding before a competent court to hear and adjudicate, where the parties interested can appear and present their respective claims. To allow a ministerial officer arbitrarily to reject returns, at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard; a thing which the law abhors and prohibits. * * * The exercise of such power is subversive of the rights of the citizen and dangerous and fatal to the elective franchise." 44 Missouri 223; *Howard v. Shields*, 16 Ohio 184; *Ewing v. Thompson*, 43 Pennsylvania 372; *Jenkins v. Waldron*, 11 John. 114; 6 Cow. 456; 23 Cow. 228.

This is the first time the question has been presented to this court; but it seems to have been presented often to the Supreme Court of other States of the Union, and with singular unanimity they all hold that the courts have power to exclude a usurper at the instance of the State, and to determine the question of usurpation they can go behind the certificate of the returning board.

In view of the express provisions of the intrusion act, and the adjudications of other States to which I have referred, I feel confident that the position I take in this case is correct. Especially as the defendant has not produced a single authority that supports his pretensions. The case of *The State v. the Judge of the Second District Court*, 13 An. 89, upon which so much reliance is placed, has really no bearing on the case at bar.

There Rousseau sought by mandamus to compel the judge, who was recused, to transfer a certain cause to an adjoining district or refer it to one of the district judges for trial; this court refused the mandamus; because the suit sought to be transferred, did not appear to be authorized by the statute under which it was brought. Therefore, there being no law authorizing the suit, it was no suit; being no suit, no appeal would lie; and no appeal lying, no mandamus could be granted.

I entirely concur in the views expressed in the dissenting opinion of the Chief Justice in that case, because the conclusions upon which the court declined to grant Rousseau relief, were conclusions that could not be legally entertained till there was a trial of the suit, which Rousseau was trying to have transferred to a competent court and tried. The Supreme Court had no original jurisdiction to decide an important issue in Rousseau's case then pending in the district court.

But what was the case of Rousseau, which this court refused to order transferred and tried? It was not a suit brought under the intrusion act. But it was a suit to contest the office of district judge, brought under a statute which only authorized contests for parish offices.

The statute under which he sued did not embrace his case; it was never heard, because this court refused to order it transferred to a competent court for trial. Therefore the remark of Mr. Justice Spofford, that the contesting of votes is not a judicial function, was not necessary to the decision of the mandamus suit; it was a mere *obiter dictum*. But suppose Rousseau's case had been before the court and the decision was that the statute under which he sued did not embrace his case, would that be authority to defeat the present suit brought under a different statute, the "intrusion act," the express provisions of which are found to embrace this case? The remedy provided in the intrusion act in no manner depends upon the existence of the statute under which Rousseau sought relief, to wit: the statute allowing electors, in their individual capacity, to contest an election. *People v. Holden*, 28 Cal. 123.

"Courts may go behind the determination of State returning boards and correct them by the returns of the district boards, and in turn may correct them by the ballots themselves, if preserved." Cooley on Constitutional Limitations, pages 625, 626.

My conclusion is that this suit is authorized by the intrusion act;

Bonner v. Lynch.

the petition shows a good cause of action ; and the question whether Lynch or Bonner is entitled to the office in dispute is a judicial question, and the cognizance thereof in no manner belongs to the political department.

I believe, therefore, that the exceptions should be overruled and the case remanded to the lower court for trial on the merits.

I therefore dissent from the decision of the majority of the Court in this case.

Rehearing refused.

No. 2869.

HERMAN JOB v. FRANK HEUER.

Where an *ex parte* statement of account, annexed to the petition, was allowed to be received in evidence, and the books of the partnership, which had been kept by the plaintiff himself and offered by the defendant, were excluded: Held—That the court *a qua* erred. The court below also erred in compelling the defendant, who had pleaded the general issue, to plead payment before permitting him to introduce proof that he had settled in full with the plaintiff. Said plaintiff having alleged a final settlement, it was competent for the defendant to prove what that settlement was.

The plaintiff having alleged a final settlement, can not go behind it and demand the investigation and adjustment of the affairs of the partnership. Besides, it could not be done in this suit, which is for a specific sum.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Gustavus Schmidt*, for plaintiff and appellee. *T. Gilmore & Sons*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff alleges that on sixteenth September, 1866, he entered into a partnership with the defendant for the purpose of carrying on the wood and lumber business in this city, which partnership continued for three years, terminating on sixteenth September, 1869, when an account of the assets was taken, and a final settlement was effected, from which it appears that the defendant is indebted to him \$1353 18. He annexes an account to the petition showing that sum due him. The court gave judgment for \$731 32, and the defendant appeals.

We think the court erred in permitting the *ex parte* statement of account annexed to the petition, to be received in evidence and in excluding the books of the partnership which had been kept by the plaintiff himself. The defendant's bills of exceptions to this ruling were well taken.

We think the court also erred in compelling the defendant, who had pleaded the general issue, to plead payment before permitting him to introduce proof that he had settled in full with the plaintiff.

The plaintiff alleged a final settlement, and it was certainly competent for the defendant to prove what that settlement was. The bill of exceptions on this point was well taken.

Having alleged a final settlement, the plaintiff can not go behind it and demand the investigation and adjustment of the affairs of the partnership. Indeed it could not be done in this suit, which is for a specific sum.

The question is, does the defendant owe the plaintiff the sum claimed. After examining the evidence in the record, we are satisfied that the demand of the plaintiff is utterly without foundation. There was a settlement in full between the partners, and there is no cause for this suit.

It is therefore ordered that the judgment appealed from be annulled, and that there be judgment for the defendant, plaintiff paying costs of both courts.

Rehearing refused.

No. 2860.**BANK OF NEW ORLEANS v. B. L. MILLAUDON AND J. M. LAPEYRE.**

Where the evidence shows that the indorser was temporarily absent from New Orleans, at which place he resided, and where his family remained during his absence; that a notice of protest, intended for the indorser, was given to one Gasquet, his son in law, at said Gasquet's office; and that the indorser never received the notice;
Held—That this is no notice and that the indorser is discharged,

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. Voorhies*, for plaintiff and appellee. *A. Trudeau*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. This is an action on a promissary note against the maker and the indorser. The maker pleaded the general issue; the indorser alleges want of demand, of protest, and notice of protest. There was judgment against the defendants, *in solido*, for the amount claimed, and the indorser, Lapeyre, alone has appealed.

The only question, necessary to decide, is whether or not there was legal notice of non-payment given to the indorser.

The evidence shows that the indorser was temporarily absent from New Orleans, where he resided and where his family remained during his absence; that a notice of protest of the note was given to one Gasquet, a son in law of the indorser, at Gasquet's office; and that the indorser never received the notice. This was no notice to Lapeyre, and he is discharged for the want thereof. *Parsons on Bills*, vol. 1, p. 556.

It is therefore ordered and adjudged that the judgment of the court *a qua* against J. M. Lapeyre be reversed, and that there be judgment in his favor rejecting the plaintiff's demand against him, with costs in both courts.

Rehearing refused.

Mazureau & Hennen v. Morgan et als.

No. 2774.

MAZUREAU & HENNEN v. W. H. MORGAN et als.

Where the allegations and the prayer of the petition and the evidence adduced make it clear that the action is predicated upon a contract, the plaintiff can not recover on a *quantum meruit*.

In this case the contract relied on is in flagrant violation of the law, Statute of 1808, thirty-first of March.

If, in a suit upon a contract, the party fail to prove the contract, but prove without objection the value of services rendered, a judgment might be rendered upon a *quantum meruit*.

But when the contract is proved, it is the law between the parties, and the parties must succeed or fail according to the terms of *that contract*. The court is not at liberty to substitute *another*, based upon the *presumed* assent of the parties.

The plaintiff's claim is inseparably connected with an unlawful contract, and must fall with it.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. B. R. Forman and O. M. Conrad & Son*, for plaintiffs and appellants. *Randell Hunt and E. Rost*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. This suit was instituted on the twenty-fifth of April, 1832. It is based upon a contract, by which the defendants agreed to pay plaintiffs, for professional services, as attorneys and counselors-at-law, one-third of whatever sum might be gained by suit or compromise, of certain claims against the widow and heirs of Price ; but in case of defeat on the claims, the defendants were not bound to pay them anything.

The statute of 1808 enacted, "that any bargain or agreement with a plaintiff or defendant on the event of any suit to receive any portion of the land or any other property that may be in dispute or sued for, as the compensation for the services of any attorney or counselor-at-law, shall be null and void to all intents and purposes." *Bul. & Cur-rey's Digest*, 21.

The contract is in flagrant violation of the law. 2 Mart. 281, *Livingston v. Cornell*.

But the plaintiffs contend that conceding the contract to be unlawful, they should recover on a *quantum meruit*.

The answer to this is, that the suit is based on a contract and not on a *quantum meruit*.

The plaintiffs make the agreement a part of their petition, they aver they acted under it, and they demand the compensation fixed by it. They allege that thereby they became the owners of one-third of the property recovered under it, and they pray to be declared the owners of one-third of the property referred to in the agreement, and for partition thereof. It is true they add the prayer that if this "be not granted, then the defendants be condemned *in solido* to pay the sum of \$50,000, which is the value of one-third of said property, and which their time and labor entitled them to."

Mazureau & Hennen v. Morgan et al.

We can not regard the concluding words of this prayer as changing the character of the suit till the allegations and the prayer of the petition make it clear that the action is predicated upon the contract.

If, in a suit upon a contract, the party fail to prove the contract, but he prove without objection the value of services rendered, a judgment might be rendered upon a *quantum meruit*.

But when the contract is proved, it is the law between the parties, and the parties must succeed or fail according to the terms of that contract—the court is not at liberty to substitute another, based upon the presumed assent of the parties.

The plaintiff's claim is inseparably connected with the unlawful contract, and must fall with it. 1 An. 176; 11 Wheaton 258.

It is therefore ordered and adjudged that the judgment of the District Court be affirmed with costs of appeal.

Rehearing refused.

No. 2855.

AFRICAN METHODIST EPISCOPAL CHURCH v. M. M. CLARK.

Where the defendant contended that the object of the original incorporators was to unite with the African Methodist Episcopal Church of the United States and be guided in the administration of its affairs by the doctrines and discipline of the general organization; and that, in accordance with said discipline, he was appointed by the Bishop of Louisiana pastor of St. James Chapel, and that he could not be discharged or dismissed from said position by the trustees or incorporators;

Held—That under the charter of the corporation this right is expressly conferred upon the incorporators, and that, in the absence of any provision on the subject, they would have possessed the power, because it is one of the incidents of their ownership of the St. James Chapel.

Courts of justice in this State sit to enforce civil obligations only, and never attempt to exercise jurisdiction over those of a spiritual character.

A PPEAL from the Sixth District Court, parish of Orleans. Cooley, J. Cotton & Levy, for plaintiffs and appellee. Lacey, Butler & Belden, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. This suit is brought by the trustees and incorporators of the African Methodist Episcopal Church, a duly organized corporation in the State of Louisiana, to prevent M. M. Clark from officiating or exercising any authority whatever as pastor of the St. James Chapel, and to restrain him from interfering with the government, control and possession of the said church house.

The defendant contends that the object of the original incorporators was to unite with the African Methodist Episcopal Church of the United States, and be guided in the administration of its affairs by the doctrines and discipline of the general organization; and that in accordance with said discipline he was appointed by the Bishop of

African Methodist Episcopal Church v. Clark.

Louisiana pastor of St. James Chapel, and that he can not be discharged or dismissed from said position by the trustees or incorporators.

The judge of the district court thought otherwise, and we agree with him.

Under the charter of the corporation this right is expressly conferred upon the incorporators. But in the absence of any provision on the subject, they would have had the power. It is one of the incidents of their ownership of the St. James Chapel.

“Neither the Pope nor any bishop has, within this State, any authority except a spiritual one; and the courts of justice sit to enforce civil obligations only; they never attempt to coerce those of a spiritual character. We must content ourselves with considering the defendant in his civil relations to the plaintiffs.” 4 R. 68.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs of appeal.

Rehearing refused.

No. 2941.

COLUMBIA FIRE COMPANY No. 5 v. JOSEPH A. PURCELL et als.

The penalty for not producing books and papers in obedience to a *subpena duces tecum*, is not imprisonment for contempt. The consequence of the disobedience is, that the party who has obtained the subpena has the right to ask that the facts which he states in his affidavit for the subpena be taken as proved.

Where the books called for were produced on the day of the trial, and the defendant did not then move for a continuance in order to allow him time to examine them, but simply objected to going to trial;

Held—That this was not sufficient. He should at least have suggested to the court that he was deprived of some right, or that an examination of the books was necessary to enable him to make out his case.

The facts of this case must be taken as established by the accounts rendered by the defendant Purcell, which clearly show his indebtedness *in solido* with his security.

APPEAL from the Fifth District Court, Parish of Orleans. *Leaumont, J.* Trial by jury. *Albert Voorhies*, for plaintiff and appellee. *George L. Bright*, for defendant and appellant.

Justices concurring: Ludeling, Howell, Wyly, Morgan.

MORGAN, J. This is a suit against Purcell and McCullen, to recover from them, *in solido*, \$1212 75.

Purcell was, during the years 1867, 1868 and part of the year 1869, treasurer of the Columbia Fire Company No. 5. There is an alleged deficit in his account of \$1212 75, for which he as principal, and McCullen, his surety, are sought to be made liable.

As to Purcell there is no defense. Judgment by default was taken against him and confirmed. McCullen, however, denies any liability. He says he signed the bond on the sixth of February, 1869, and

that during the time Purcell continued to be treasurer of the company after his signing it, he discharged his duties faithfully. He says that if Purcell is indebted to the company his indebtedness existed anterior to the date of the bond, and that he is only bound to respond for his acts after his obligation was assumed.

The defendant objects to the rulings of the District Court on two questions, which he contends, prevented him from making a proper defense, and admitted testimony which should have been excluded.

On the twenty-fifth of January he moved the court for a *subpena duces tecum* upon the plaintiffs to bring into court, on the fourth of February, 1870, the day upon which the case was fixed for trial, the accounts rendered to them by Purcell during the year 1868 and up to April, 1869; the minute book of the company for the years 1868 and 1869; the reports of the finance committee during the years 1868 and 1869, and the company's bank book for 1868 and 1869; and in the same motion he asked that the company be directed to bring the documents into the clerk's office at ten o'clock A. M., on the day after the service of this order, the books, etc., above referred to, they to remain there until the further order of the court, for examination by the defendant and his counsel. The order not having been complied with, the defendant moved the court that the president and secretary of the company be imprisoned for a contempt, which order the court refused to issue. This ruling of the judge was correct. The penalty for not producing books and papers in obedience to a *subpena duces tecum* is not imprisonment; the consequences of the disobedience is that the party who has obtained the *subpena* has the right to ask that the facts which he states in his affidavit for the *subpena*, may be taken as proved, which was not done here.

When the case was called for trial defendant objected to proceeding therewith, on the ground that plaintiffs had not complied with the order of court commanding them to produce the books. The books were produced on the day of trial. Defendant did not then move for a continuance in order to allow him time to examine them, he simply objected to going to trial. This is not sufficient; he should have at least suggested to the court that he was deprived of some right, or that an examination of the books was necessary to enable him to make out his case. The judge was right in ordering the trial to be proceeded with under the state of facts presented by the record.

The opinion to which we have come on the merits renders it unnecessary to pass upon the second bill of exceptions.

The account rendered by Purcell on the first July, 1869, to the plaintiff, shows that he had on hand at that time belonging to the plaintiff \$1212 75. This is the sum which it is claimed he owed the company when he ceased to be its treasurer, and for which the surety on his

bond is sought to be made liable. On the first of April, by his account rendered on that day and offered in evidence by defendant, he appears to have had on hand \$2217 30 to the credit of the relief fund, against a debit to the general fund of \$299 10. By the accounts, then, which he furnished in 1869, he always showed a balance on hand in favor of the company. Examined as a witness, he says that on the first January, 1869, he was indebted to the company in the sum of \$1621 70. That on the sixth February, the day on which the bond was signed, he owed the company \$1484 50. But this statement is difficult to be reconciled with what he states in continuance of his evidence, when, in answer to the question "during 1868 did you at all times have the moneys of the company on hand?" propounded to him by defendant's counsel, he says: "I can not exactly swear to that, but I had, I expect, very near it." "In cash?" asks the counsel. "Yes, sir," is the reply. We think we must take the facts as they are established by his accounts, which clearly show the amounts on hand when they were rendered and his indebtedness, for which his surety is responsible.

The judgment of the court was in favor of the plaintiff, and we do not see any error in the verdict of the jury upon which it was rendered.

The judgment is affirmed with costs.

Rehearing refused.

No. 4518.

STATE ex rel. RECORDER OF MORTGAGES v. CHARLES CLINTON, Auditor.

Where the plaintiff prayed for a mandamus to compel the Auditor to issue to him warrants on the State Treasury for compensation for mortgages recorded by him under the section 67 of act 42 of 1871, at the rate of \$1 50 per each mortgage, in accordance with the roll which he had furnished to the Auditor, and which is in the Auditor's possession;

Held—That there is nothing in the record showing that the amount claimed exceeds five hundred dollars and vests jurisdiction in this court. It may be above or below that sum. The jurisdiction of the court must be apparent from the pleadings. It can not be guessed at.

The Recorder of Mortgages is not mentioned in section 52 of act 42 of 1871, and this court can not supply the omission, if it be an omission.

If the relator has registered mortgages in favor of the State and the State has not paid him therefor, and his compensation is not otherwise provided for by law, and his legal demands have not been complied with, he may have his recourse against the State, but his remedy is not by mandamus against the Auditor.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Horner and Benedict*, for relator and appellant. *A. P. Field*, Attorney General for respondent and appellee.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

MORGAN, J. Section 67 of the acts of 1871 (act No. 42) provides that, in New Orleans, a list of delinquent taxpayers shall be recorded

and sent to the Auditor of Public Accounts, on or before the second Monday of December of each year, with a proper certificate thereto affixed.

The relator prays that the auditor be compelled to issue to him warrants on the State Treasury in his favor for compensation for mortgages recorded by him under the law quoted, at the rate of one dollar and fifty cents for each mortgage, in accordance with the roll which he has furnished to the auditor, and which is in his (the auditor's) possession.

He claims payment for these services under the fifty-second section of the act referred to, which provides that :

“The assessors and tax collectors in the city of New Orleans, and the tax collectors of the other parishes of the State, and all others herein named in connection with the assessment and collection of taxes, shall be paid by the State Treasurer, on the warrant of the Auditor of Public Accounts, out of any moneys in the treasury not otherwise appropriated.”

There are good reasons why this application should be refused.

First—We are entirely in the dark as to the amount which is sought to be taken from the treasury in this claim, and we, therefore, are not informed as to whether we have jurisdiction in the matter. We have no appellate jurisdiction except in cases where the amount claimed, or in dispute, exceeds five hundred dollars, and we do not think that the mere demand that “the auditor be ordered to issue his warrants on the State Treasurer in favor of the relator for compensation at the rate of one dollar and fifty cents each for the mortgages recorded as aforesaid, as appears by the roll in possession of said auditor, or show cause to the contrary on a day to be fixed by the court,” is any basis for our assuming, even if we were permitted to do so, that the amount claimed exceeded five hundred dollars, when the roll upon which the claim is based is not in the record, particularly when we find in the record an acknowledgment of the recorder in the shape of a receipt for \$1537 60, paid by the auditor for “certified copies of delinquent tax lists for 1871 of the First, Second, Third, Fourth, Fifth and Sixth Districts of the city of New Orleans, containing 768,796 words, as per certificates hereunto attached, and at twenty cents per hundred words.” We may be passing upon a claim involving many thousands of dollars, but the matter in dispute may not after all be over five hundred dollars. Our jurisdiction must be apparent from the pleadings; we can not guess at it.

Second—The fifty-second section of the act upon which the relator relies, refers alone to the payment of assessors and tax collectors; the Recorder of Mortgages is not mentioned therein, and we can not supply the omission, if it be an omission.

State ex rel. Recorder of Mortgages v. Clinton, Auditor.

Third—The Register of Conveyances and Recorder of Mortgages of the city of New Orleans are, by the 3172d section of the Revised Statutes, entitled to \$1 50 for each registry of mortgage. If the relator has registered mortgages in favor of the State, and the State has not paid him therefor, and his compensation is not otherwise provided for by law, and his legal demands have not been complied with, he may have his recourse against the State; but his remedy is not by mandamus against the auditor.

For these reasons the judgment of the lower court is affirmed, with costs.

Rehearing refused.

No. 3682.

A. MILTENBERGER & Co. v. W. H. KEYS, Sheriff and als.

Where a fair and correct settlement was made between A. Verret and his sons-in-law, W. H. and J. M. Knight, in which the mortgage judgments in favor of their wives against Verret were placed to their credit and reduced their own indebtedness *pro tanto*, and subsequently W. H. and J. M. Knight transferred said judgments to Adams & Co., and their wives ratified the transfer;

Held —That Adams and Co., obtained no mortgage under said transfer, because the judgments thus transferred had been extinguished by the settlement between W. H. Knight, J. M. Knight and A. Verret, which was a valid one. The husbands could have sold those judgments or collected the amount of the judgments and used the money in payment of their debts, or in any other way they had chosen.

The power of the husband to administer the wife's property is different from that of an ordinary attorney. One essential difference is, that the husband may lawfully appropriate to his own use the money of his wife, collected by him. The attorney can not.

A PPEAL from the Fifteenth Judicial District Court, parish of Terrebonne. *Beattie, J. Rightor and McCollam, Legendre and Porche*, for plaintiffs and appellants. *Goode and Winder*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. Marie Louise and Marie Elizabeth, daughters of Adolphe Verret, of Terrebonne, had a legal mortgage upon their father's property to secure the sum of eleven thousand four hundred and forty-nine dollars, as shown by a final account of A. Verret, homologated on the twenty-seventh of April, 1852.

The general mortgage was converted into a special mortgage on the undivided half of a plantation in Terrebonne. Louise and Elizabeth Verret, having intermarried with William H. and John M. Knight, brought suit against their father and obtained judgments against him in July 1867, each for five thousand seven hundred and twenty-four dollars, with legal interest from twenty-seventh April, 1852, with recognition of their mortgages.

On the twenty-second of May, 1869, a settlement was made between

Miltenerger & Co. v. Keys, Sheriff, and als.

A. Verret and his sons-in-law, W. H. and J. M. Knight, in which the judgments in favor of their wives were placed to their credit, and reduced their indebtedness to Adolphe Verret *pro tanto*.

This settlement is evidenced by a written memorandum signed by the parties—and, in this case, the Messrs. Knight and Adolphe Verret have testified that the settlement was a fair and correct settlement of their affairs.

Subsequently, on the eighth of June, 1869, the Messrs. Knight transferred to Adams & Co. the two judgments obtained by their wives against A. Verret, and their wives ratified the transfer.

A. Miltenerger & Co., who hold a mortgage next in rank after the mortgages of Louise and Elizabeth Verret, on the property of Adolphe Verret, contest the right of Adams & Co. to a mortgage under the transfer to them of the judgments in favor of Louise and Elizabeth Verret v. A. Verret, on the ground that the said judgments were extinguished by the settlement between W. H. & J. M. Knight and Adolphe Verret, made on the twenty-second of May, 1869.

The question presented for our decision is, was the settlement made by the Messrs. Knight, of their wives' judgments, valid or not; had they the right to use the judgments as they did? We are at a loss to imagine why the settlement was not valid. The husbands could undoubtedly have sold those judgments or collected the amount of the judgments, and used the money in payment of their debts, or in any other way they had chosen; and we can see no reason why, instead of taking the money from A. Verret and then immediately returning it to him, they could not accomplish the same thing by a written statement of their accounts and settlement. C. C. 2390, 2285; 4 R. 114; 12 Rob. 524; 19 La. 440; 12 An. 562; 13 An. 536.

The cases of Nolan v. Rogers, 4 N. S. 145, and Hickey v. Tharp, 4 La. 336, relied upon by the defendants, have no application to the question at issue in this case. They relate to the powers of an ordinary attorney. The case of Hourahan v. Leclercq, 15 An. 204, is also relied upon, and it appears to have some application to the case in hand. A careful examination of the case, however, satisfies us that the portion of the opinion which bears upon the question, to wit: the right of the husband to receive his own debts in payment of debts due to his wife, is an *obiter dictum*. In that case the court said: "The husband, in the administration of the wife's separate estate, acts as her mandatory or agent, and his power or authority to receive his own debts in payment of debts due to his wife, must be determined by the rules of law which regulate the contract of mandate. And according to these rules, an agent has no authority to take his own obligations in payment of debts due to his principal. Hickey v. Tharp, 4 La. 337; Nolan v. Rogers, 4 N. S. 145."

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It is needless to say that the power of the husband to administer the wife's property is different from that of an ordinary attorney. One essential difference is, that the husband may lawfully appropriate to his own use the money of his wife collected by him; the attorney can not. C. C., 2390.

We are of opinion that the settlement made on the twenty-second of May, 1869, was valid, and that the judgments in favor of Marie Louise and Marie Elizabeth Verret, wives of W. H. and J. M. Knight, against Adolphe Verret, were extinguished by payment.

This view of the case renders it unnecessary to examine the bills of exception taken in this case.

It is therefore ordered and adjudged that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the plaintiffs perpetuating the injunction, that the recorder of the parish of Terrebonne do cancel and erase the special and judicial mortgages in favor of the said Marie Louise and Marie Elizabeth Verret, wives of W. H. and J. M. Knight, against the property of Adolphe Verret described in the petition for injunction, and that the defendants pay costs of both courts.

Rehearing refused.

No. 3931.

JOSEPH LE BLANC v. LOUIS ST. GERMAIN.

The benefit of the homestead act can be pleaded in bar of the foreclosure of a conventional mortgage given on the homestead subsequent to the enactment of the law.

It can not be rightfully contended that, in consenting to the mortgage, the plaintiff in injunction waived the benefit of this exemption, and that it amounted to a renunciation of the right. No one is presumed to waive a legal right, and every contract is supposed to be made in reference to the law that governs it. In this case there was no express renunciation or waiver.

APPEAL from the Second Judicial District Court, parish of St. Bernard. *Pardee, J. E. H. McCaleb, A. & J. M. Livaudais*, for plaintiff and appellee. *Marcel Ducros*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff, who enjoined the foreclosure of the mortgage of the defendant on the ground that the property seized is his only homestead, appeals from the judgment dissolving the injunction with ten per cent. damages.

That the property seized is defendant's only homestead is not disputed. The question is, can the benefit of the homestead act be pleaded in bar of the foreclosure of a conventional mortgage given on the homestead subsequent to the enactment of the law? By section 691 of the Revised Statutes of 1870, in certain cases the homestead is exempt from seizure "in addition to property and effects now exempt

from seizure and sale under execution." The defendant contends that the law has no application to a sale under the foreclosure of a mortgage, but only refers to sales "under execution." We can not accept this interpretation of the law. It has a broader meaning. The obvious purpose of the law-giver was to exempt from forced sale in certain cases the homestead of the debtor; and it is the intention of the law-giver that we must seek and give effect to.

The defendant contends also, that in consenting to the mortgage the plaintiff waived the benefit of this exemption; that it amounted to a renunciation of the right. No one is presumed to waive a legal right; every one is presumed to contract in reference to the law. The plaintiff and defendant are presumed to have done so. Nothing was said in the contract in regard to the remedy thereon. This the law supplied as thoroughly as if inserted in the instrument. Section 691 of the Revised Statutes appertains to the remedy; and if in forced sales it can be disregarded at all (of which we here express no opinion) it must be by an express renunciation or waiver.

It is therefore ordered that the judgment appealed from be annulled, and it is now ordered that the injunction herein be perpetuated and that the defendant pay cost of both courts.

Rehearing refused.

No. 4592.

NANCY DOUGHTY v. THE SHERIFF and als.

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Where a wife had obtained a judgment against her husband, under which his property had been sold and purchased by her;

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Held—That after her purchase the judgment creditors of her husband could seize the same property as his, and that the wife had not the right to enjoin the sale thereof, inasmuch as the sale to her was not recorded in the recorder's office.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. D. G. Wedge, Race, Foster & Merrick*, for plaintiff and appellant. *Kernan & Lyons*, for defendants and appellees.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

LUDELING, C. J. The defendants, H. B. Chase and John Effat, obtained judgments against Wm. F. Doughty, the husband of plaintiff. She had obtained a judgment against her husband under which his property had been sold and purchased by her. After her purchase, the judgment creditors of her husband seized the same property as his, and the plaintiff has enjoined the sale thereof. The defendants had a right to seize the property, inasmuch as the sale to the wife was not recorded in the recorder's office. 21 An. 427, 241; 22 An. 113.

It is therefore ordered and adjudged that the judgment of the district court be affirmed with costs of appeal.

Lartigue v. Clara White, Wife of Carl Kohn, and als.

No. 2945.

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48 1259**A. LARTIGUE v. CLARA WHITE, Wife of Carl Kohn, and als.**

Where the motion was to dismiss the appeal, on the ground that the amount in dispute did not exceed five hundred dollars;

Held—That the suit being for one thousand dollars against three heirs who are in possession of the estate they inherited, for services rendered as attorney in settling the succession, and judgment having been asked and granted in the court *a qua* against them jointly for said sum, in proportion to the respective shares received by them, the motion must be overruled, because the claim, as stated, is one against the succession, and the fact that there are several heirs who must pay proportionately, does not change the nature and amount of the matter in dispute.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. E. Howard McCaleb*, for plaintiff and appellee. *Miles Taylor and William Grant*, for defendants and appellants.

ON MOTION TO DISMISS THE APPEAL.

Justices concurring: Ludeling, Taliaferro, Howell, Howe.

HOWELL, J. The plaintiff moves to dismiss this appeal because the amount in dispute does not exceed five hundred dollars. The suit is for one thousand dollars against three heirs, who are in possession of the estate, for services as attorney at law by special employment in settling the succession inherited by them, and judgment was asked and granted against them jointly for said sum in proportion to the respective shares received by them.

The claim, as stated, is one against the succession, and the fact that there are several heirs, who must pay proportionately, does not change the nature and amount of the matter in dispute. It grew out of one contract in relation to one matter, the succession of the deceased, which is an entire thing.

The authorities cited by appellee do not apply to a case like this.

It is ordered that the motion be overruled.

WYLY, J., *dissenting*: For the reasons assigned in my dissenting opinion in *A. Lartigue v. Eliza White, wife of C. Bullitt et als.*, I dissent in this case.

ON THE MERITS.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The heirs of Mrs. White, wife of Maunsel White, appeal from the judgment condemning them to pay the plaintiff one thousand dollars for professional services.

At the same time the plaintiff was employed to obtain the orders mentioned in the case just decided in the succession of Maunsel White;

Lartigue v. Clara White, Wife of Carl Kohn, and als.

he was employed to obtain similar orders in the succession of Mrs. White, and this controversy arises in reference to the value of these services. As the orders were all obtained without opposition and by consent, we think one hundred dollars will be fair compensation.

It is therefore ordered that the judgment herein be reduced to one hundred dollars, and as thus amended that it be affirmed, appellee paying costs of appeal.

Rehearing refused.

No. 4118.

G. W. W. GOODWYN v. PERRY & Co.

Where judgment being rendered in this case on the sixth of May, 1872, in favor of defendants, an appeal was granted on the fourteenth of the same month, returnable on the first Monday in November, on motion to dismiss the appeal on the ground that said first Monday in November was not the legal return day ;

Held—That the first return day after this appeal was taken, being the third Monday in May ; that the judgment having been rendered on the tenth of the same month ; and that the transcript of the case containing over two hundred pages ; it must be presumed that the judge *a quo* thought it could not have been completed by that time, as the court adjourns before the first of June to the first Monday in November, and it follows that the first Monday in November was the proper return day.

Where a creditor, ignorant of the fact that his claim on his debtor was secured, wrote to other creditors of the same, expressing his assent to accepting concurrently with them the surrender of property offered on certain conditions by said debtor, because he believed that he was in no better condition than those creditors ;

Held—That this was a contract which was void from error in the motive, inasmuch as it proceeded from a cause supposed to exist, which in reality did not exist, and because its existence was a condition precedent to the contract.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Hyman, Wallace and Handlin*, for defendants and appellees. *Randolph, Singleton and Browne*, for plaintiff and appellant.

ON MOTION TO DISMISS THE APPEAL.

Justices concurring : Ludeling, Taliaferro, Howell, Morgan, Wyly.

MORGAN, J. Judgment was rendered in this case on the sixth May, 1872, in favor of defendant. An appeal was asked for and allowed on the fourteenth May, returnable on the first Monday in November.

We are asked to dismiss the appeal on the grounds that there were six days to the third Monday in May, and that as there appears no proof or suggestion to the contrary, the presumption is there was ample time to prepare so small a record, and the first Monday of November was not the legal return day ; and because this court was in session when the appeal was taken, and the law provides that, during the term, appeals shall be returnable on the first and third Mondays of every month.

The law relied upon (acts of 1870, p. 99, section 1,) provides that in all cases of appeal the judge of the court from which it is taken shall

make the appeal returnable to the Supreme Court at the next return day for appeals from the parish, if there shall be time enough after granting it to give the notice required by law and to prepare the record; if not, then he shall fix the return day for some day within the next term after the appeal is granted, allowing sufficient time to give the citation required by law, and to prepare the record, if sufficient time within the term shall remain; if not, then he shall fix the return day for the following term.

The first return day after this appeal was taken was the third Monday in May. As the judgment was only rendered on the tenth of May, and as this transcript contains over two hundred pages, we must presume that the District Court thought it could not have been completed by that time.

As this court adjourns before the first of June to the first Monday in November, it follows that the first Monday in November was the proper return day.

The motion to dismiss is therefore overruled.

ON THE MERITS.

Justices concurring: Ludeling, Taliaferro, Morgan.

TALIAFERRO, J. This is an injunction suit which has grown out of the case of Perry & Co. v. Austin & Goodwyn, before this court in 1872.

See 24 An. p. —. Upon the return of the mandate of this court in the latter case, execution was issued against the defendants, Austin & Goodwyn. G. W. W. Goodwyn obtained an injunction to stay the proceedings under execution, on the ground that subsequent to the appeal of Austin & Goodwyn to the Supreme Court in the case of Perry & Co. v. Austin & Goodwyn, and while that appeal was pending Perry & Co. accepted a proposition, made by Goodwyn, solely bound for the debts of his firm, to pay the creditors a certain portion of their debts, the firm of Austin & Goodwyn being insolvent. The plaintiff alleges that he was entirely discharged from all further liability to Perry & Co. by their acceptance and ratification of the surrender of his property. The defendants in injunction filed an exception to the proceeding, alleging various grounds, and prayed that the injunction be dissolved with damages. Judgment was rendered dissolving the injunction and condemning Goodwyn, the principal, and Philip Hallorand, surety on the injunction bond to pay *in solido* to the defendants, Perry & Co. seventy-five dollars special damages, with three per cent. additional interest on the principal of the judgment enjoined till paid, and costs.

From this judgment the plaintiff has appealed. It appears that

pending the suit of Perry & Co. against Austin & Goodwyn, the last named firm, finding themselves unable to meet their obligations, propositions were made through Goodwyn to make a surrender of their property and assets to their creditors, on condition that Goodwyn should retain his tools which he used in his trade, and a small amount in money to begin a small business. Bridgeford & Co., of Louisville, Kentucky, were creditors for the largest amount, and it appears that they accepted the proposition of surrender, and were active in urging the other creditors to do so. All the creditors, except Perry & Co., were prompt in closing with the proposal of Goodwyn. Bridgeford & Co. wrote at considerable length to Perry & Co., at Albany, New York, representing that the acceptance of the surrender was the best that could be done; that by acceding to the proposal the creditors would realize from fifty to sixty cents on the dollar for their debts; whereas if they refused, the insolvents would be compelled to go into bankruptcy, and if so, the creditors would realize little or nothing. In reply Perry & Co. wrote on the twenty-third September, 1870, as follows:

"Messrs. Bridgeford & Co., Louisville, Ky.:

"Gentlemen—In reply to your favor of the nineteenth instant respecting our claim against Mr. G. W. W. Goodwyn, we leave the matter entirely in your hands, feeling confident you will act for us the same as you would for your own interest. Whatever arrangement you may deem best to come to will be perfectly satisfactory to us.

"Respectfully yours, PERRY & Co."

On the same day they wrote to their attorneys in New Orleans:

"ALBANY, September 23, 1870.

"Messrs. Wallace & Handlin:

"Gentlemen—We have been informed by Messrs. Bridgeford & Co., of Louisville, Ky., that Mr. G. W. W. Goodwyn has assigned for the benefit of his creditors, retaining the right to hold \$400 in cash and \$150 in tools. We suppose you have obtained no special security on our account, and that we will have to accept the terms with the others.

"Yours, respectfully, PERRY & Co."

Their attorneys answer this letter on the twenty-eighth of September. After saying that they know nothing of any steps being taken by Goodwyn towards an assignment they write: "Instead of your case being in the fix you suppose, we, on the contrary, think we have good security, one who owns plenty of real estate. We have, therefore, no doubt about our ability to make the money as soon as the appellate court decides the case. Our courts open again in November.

"Your obedient servants,

"WALLACE & HANDLIN."

Perry & Co., therefore, wrote again to Bridgeford & Co.:

“ALBANY, October 8, 1870.

“Messrs. Bridgeford & Co., Louisville, Ky.:

“Gentlemen—With regard to our claim v. Mr. G. W. W. Goodwyn, we have just received word from our attorneys that they hold ample security for the payment of the same, and, of course, we can not agree to give up this security.

“Respectfully yours,

PERRY & Co.”

It seems there can be no doubt that Perry & Co. when they assented to the proposition communicated to them by Bridgeford & Co., believed their debt stood on no better ground than that of the other creditors, and were influenced by the letter of Bridgeford & Co. to agree to accept the surrender, thinking they would get a larger percentage on their claim by so doing than by forcing their debtor into bankruptcy, and thereby realize but little after the charges of the bankrupt court were paid. Their debt, in point of fact, was secured at the time they wrote to Bridgeford & Co. under date of September 23, but they were ignorant of it. The consent given at that date proceeded from a cause supposed by them to exist, which in reality did not exist; and its existence was a condition precedent to the contract. The contract is, therefore, void from error in the motive. C. C. 1815, 1818, 1819, 1820, 1821. Also C. C. articles 1816–1840, *et sequents*. 2 L. 3; 6 L. 511.

The defendants, as soon as they were informed by their attorneys that their debt was fully secured promptly retracted their consent given in ignorance to accept the plaintiff's surrender. We think the decree of the lower court correct.

Judgment affirmed.

WYLY, J., *dissenting*. On the thirteenth of September, 1870, Goodwyn made an assignment of all his property, except four hundred dollars in cash and one hundred and fifty dollars worth of tools, to his creditors, in whose behalf Bridgeford & Co. accepted the assignment and gave Goodwyn a “full and complete discharge of their said claims,” * * * “so that this agreement shall have the effect of being, as to such creditors and all of them, a receipt in full against their claims or the claims of any of them.”

On the sixteenth of September, 1870, Bridgeford & Co. wrote to Perry & Co. that: “We asked Mr. Goodwyn if he would be willing to assign everything to us for the benefit of his creditors, and he replied that he did not want everything in the wide-world taken from him, and have no support for his large family; that he had been unfortunate and was satisfied that he had not wronged any of his creditors

out of anything, and would not make an assignment without a release from all his creditors of any further claim against him, and a small sum to support his family a short time, to enable him to get into a small business. We then went and consulted our attorney in regard to the matter, and he desired to know if we would take the responsibility of entering into an agreement with Goodwyn, releasing him from all further claims of his creditors against him, and we replied that it would be rather hazardous to do so. In the meantime Mr. Goodwyn had consulted his attorney and a meeting was called to consider the matter. Mr. Goodwyn's attorney advised him to go into bankruptcy, and that would settle the whole matter at once. Mr. Goodwyn remarked that he did not like to go into bankruptcy; that as we had been so very clever to him he did not like to take such a step. But we could see at the same time that if something was not done very soon, Mr. Goodwyn's attorney would have persuaded him to go into bankruptcy."

"We then consulted our attorney if it would not be best to let it be settled in the Bankrupt Court, and he replied by no means; that the costs would consume everything, and we would not realize twenty-five cents on the dollar, and if we would settle it in the way proposed by Mr. G., it would be best for all parties. We saw that it was impossible to come to a settlement any other way, and something would have to be done at once to stop the enormous expense that was eating the whole thing up like a cancer. You are aware that he was paying four thousand dollars rent for the house he occupied, and that he had one year to run from the first of October next. Mr. G. then said that if we would draw an agreement to this effect, releasing him from all claims against him and give him four hundred dollars in cash and one hundred and fifty dollars in tools that were in his shop, to enable him to commence business in a small way, he would consent to making the assignment. Our attorney advised us to do so, and the assignment was drawn in duplicate and signed accordingly. As it is now, we think we will get from fifty to sixty cents on the dollar. We also took the responsibility of appointing Mr. Goodwyn our attorney to settle the business, making inquiry at the time of a number of the leading houses in the city if they would advise us to do so, and they replied that we could not get a better man, as he was as honest a man as lived, but had been unfortunate; and when we left there on last Wednesday, the fourteenth instant, he was progressing with the sale of the stock rapidly, and would endeavor to sell the entire stock by the first of October.

"There was a party negotiating for the store when we left, and it is probably rented by this time. We went down with a determination to close it up and stop expenses, and we hope our action will meet your

Goodwyn v. Perry & Co.

approbation. One thing you may rest assured, that we will all fare alike.

“Yours, truly,

(Signed)

BRIDGEFORD & Co.”

To the foregoing letter, Perry & Co., the defendants, made the following reply :

“ORIENTAL AND AMERICA STOVE WORKS.

PERRY & Co.,

September 23, 1870, 115 Hudson street, Albany,

250 Water street, New York.

“Messrs. Bridgeford & Co., Louisville, Kentucky :

“Gents—In reply to your favor of the sixteenth instant, respecting our claim *v.* Mr. G. W. W. Goodwyn, we leave the matter entirely in your hands, feeling confident you will act for us the same as you would for your own interest. Whatever arrangement you may deem it best to come to will be perfectly satisfactory to us.

“Respectfully yours,

(Signed)

PERRY & Co.”

It occurs to me, from the foregoing statement, that Bridgeford & Co., in order to get the assignment and secure something for the creditors, assumed to act as agents for Perry & Co.; and acting in good faith they promptly communicated to Perry & Co. all the facts, as well as the reason that induced them to assume the agency. With full knowledge of all the facts Perry & Co. wrote the letter of twenty-third September, 1870, which I can not construe to mean anything less than a ratification of what had been done in their behalf by Bridgeford & Co.

The moment the ratification occurred, the obligation to discharge Goodwyn of his debts became complete and binding on Perry & Co., and Bridgeford & Co.'s responsibility on account of assuming the agency ceased.

This assent was equivalent to previous authority, and the moment it was given the contract became as complete and irrevocable on Perry & Co. as if they had signed it. Story on Agency, sections 242, 243, 244, 250, 151.

Now the question is, suppose Perry & Co. had signed the discharge of Goodwyn and accepted the assignment of his property, just as Bridgeford & Co. assumed to do for them, would they be permitted, three weeks afterwards, to withdraw from the contract on the ground that they did not understand the exact situation of their claim; that they did not know that their attorneys had the security of a suspensive appeal bond?

Whose business was it to know the exact situation of Perry & Co.'s case? It was theirs; and they are presumed to know what their attorneys are doing in their behalf. It is not pretended that Bridgeford

& Co. knew anything of the security existing in support of Perry & Co.'s claim, and it is not pretended that Goodwyn withheld any information or committed any fraud in going into the transaction.

Suppose Perry & Co. had applied to Goodwyn for the assignment, as was done for them by Bridgeford & Co., would they be heard in demanding the rescission of the contract, to say that they did not know that their claim, the equivalent they had given for the assignment, was as valuable as it was; that it was secured by a suspensive appeal bond? I think not. This was no excuse to Perry & Co. They pressed the assignment on Goodwyn through their agents, or agents whose acts they ratified, and prevailed upon him against the advice of his counsel to make the assignment of his property.

He saw certain relief from his embarrassments in surrendering his property in bankruptcy, and was advised by his counsel at once to do so; but upon the representation of those whose acts have been ratified by Perry & Co., that he would be discharged by his creditors if he would assign to them his property, he was induced to make the assignment.

In my opinion a commutative contract made under the circumstances detailed, ought not to be avoided for the cause set up by Perry & Company.

The relation of Goodwyn to Perry & Company is the same as if they had gone to him in person and procured from him the assignment of his property. As to him there was no error of motive in the contract. Perry & Company contracted for the assignment of his property and he for a discharge of their debt against him.

Now as to the value of that property or the value of the equivalent given by Perry & Company, or their agent, it is immaterial. If it turned out that the goods assigned were worth double the amount of Goodwyn's debt, or that Perry & Company's claim was worth double the amount of the goods, the contract would remain unimpaired. It was no part of Goodwyn's undertaking to inform Perry & Company of the value of their claim or to advise them not to press the contract upon him till they had corresponded with their attorney.

If Perry & Company chose to ratify unconditionally the contract made in their behalf by Bridgeford & Co., and pressed upon Goodwyn, without waiting for the advice of their counsel as to the situation of their claim it was their own fault. It was not the fault of Goodwyn. Besides, if there were a good cause to annul the commutative contract there has been no return nor offer to return the property assigned.

I therefore dissent in this case.

State ex rel. Gay & Co. v. Judge of the Fourth District Court, parish of Orleans.

No. 3904.

STATE OF LOUISIANA ex rel. E. J. GAY & Co. v. JUDGE OF THE
FOURTH DISTRICT COURT, parish of Orleans.

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52	1193

The case of *Block Brothers v. Burthe*, 20 An. p. 344, which, in the opinion of the judge *a quo*, covers the case at bar in every particular, was determined on the ground that the opponent was properly the defendant and had the right to release by bond, an act which could not be considered as operating an irreparable injury to the appellant.

There seems to be a conflict between the case of *Block Brothers v. Burthe* and that of *Duperier v. Flanders*, 20 An. 29. The court, however, inclines to recognize the doctrine laid down in the latter case, and to follow the principles enunciated in the later case of *Dawson v. Williamson*, 22 An. 535, as controlling.

RULE for a mandamus on Paul Théard, Judge of the Fourth District Court, parish of Orleans, in the case of *E. J. Gay & Co. v. Eaton & Barstow*—B. Bihen and als. intervening. *Race, Foster and Merrick*, for relators. *Breaux, Fenner & Hall*, for intervenors. Judge Théard, *in propria persona*.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Howe.

TALIAFERRO, J. The relators sequestered ten hogsheads of sugar and sixty-nine barrels of molasses, alleging that they, as the merchants of Eaton & Barstow, sugar planters, furnished them with provisions, supplies and money, to enable them to cultivate their crop of sugar and to gather and prepare it for market, and on that account they have by law, a lien and privilege upon the crop, of which the ten hogsheads of sugar and the sixty-nine barrels of molasses form a part, and which was then within the jurisdiction of the court. They averred that Eaton & Barstow was indebted to them in the sum of \$4771 78. They prayed judgment for that amount, with privilege on the property sequestered, etc. Eaton and Barstow answered by general denial. John H. Bihen, who had been the manager of the plantation on which the crop was raised, together with a number of laborers employed in its cultivation, intervened, alleging that the sugar and molasses sequestered were transferred and delivered to them, having been given to them in part payment of their wages, and that they are the absolute owners of the same, and as such had through an agent, who had advanced them \$980 in cash upon the property, shipped it to New Orleans to be sold. Eaton & Barstow answered this intervention, admitting the facts stated to be true. These parties intervening were allowed to release the property by giving bond. The plaintiffs, who are the relators, objecting to the order allowing these intervening and opposing parties to give bond, applied for a suspensive appeal, which being refused, the relators applied to this court for a mandamus to the judge of the Fourth District Court to compel him to grant the appeal. To the rule *nisi* the judge answered that his action had been taken in conformity with the decision of this court in the case of *Block Brothers v. Burthe*, 20 An., page 344, which in the opinion of the judge

State ex rel. Gay & Co. v. Judge of the Fourth District Court, parish of Orleans.

covers the case at bar in every particular. That case was determined on the ground that the opponent was properly the defendant, and had the right to release by bond, an act which could not be considered as operating an irreparable injury to the appellant.

There seems to be a confiction between the case of Block Brothers v. Burthe and that of Duperier v. Flanders, 20 An., page 29. We incline, however, to recognize the doctrine laid down in the latter case, and to follow the principles enunciated in the later case of Dawson v. Williamson, 22 An., page 535, as controlling.

It is therefore ordered that the rule be made absolute.

NOTE.—The preceding case was decided on the twenty-second of April, 1872, and properly belonged to the Twenty-Fourth Annual. It having not appeared in that volume, it is, at the request of my predecessor, reported in this one.—REPORTER.

No. 3380.

PATRICK IRWIN v. JAMES M. PETERSON.

Where defendant was sued for half the value of a wall, which said defendant made a wall in common by using it to support his buildings;

Held—That he had no interest to question plaintiff's title further than to ascertain whether the claim demanded could safely be paid to the claimant.

Where evidence was admitted because it was confirmatory and explanatory of the title filed in answer to the prayer foroyer, and did not constitute a new and independent title;

Held—That the bill of exceptions thereto was not well taken.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. T. Gilmore & Sons*, for plaintiff and appellee. *Bentinck Egan*, for defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The defendant appeals from the judgment condemning him to pay the plaintiff \$591 77, the value of half of a wall, which the defendant made a wall in common by using it to support his buildings in 1868.

The plaintiff joins in the appeal, and prays that the judgment be increased to the amount claimed in his petition (\$1001 97).

The plaintiff acquired the property from E. E. Norton, assignee of Jacob Barker, who erected the wall in 1852. When the defendant, in 1868, made it a wall in common, he incurred the obligation to pay half of what was laid out in its construction. Asserting the right conferred by article 676 Revised Code, the defendant must comply with the condition upon which that right is given, to wit: he must pay half the cost of constructing the wall. 20 An. 554; 22 An. 114; 23 An. 597.

He has no interest to question plaintiff's title further than to ascertain whether the claim now demanded can safely be paid to him. We think whatever right Jacob Barker, the builder, had to demand remuneration for half the cost of the wall belongs to the plaintiff, and that

 Irwin v. Peterson.

payment of this demand will protect the defendant from any further contribution that may be demanded for making the wall a wall in common.

The bill of exceptions to the introduction of plaintiff's title, resulting from the adjudication of twentieth June, 1868, and the confirmatory act of sixth July, 1868, was not well taken, for the reason given by the judge in refusing to reject this evidence.*

The total number of bricks laid in the wall is 91,043, and the value per thousand in 1852, when the work was constructed, we fix from the evidence at \$14. One-half the cost of the wall was, therefore, \$637 30, for which plaintiff should have judgment.

It is therefore ordered that the judgment appealed from be amended, and that the amount thereof be increased to \$637 30, and as thus amended that it be affirmed with costs of both courts.

Rehearing refused.

 No. 4612.

JOHN BURK, Clerk of the Superior District Court, v. CITY OF NEW ORLEANS et als.

Where the plaintiff sued for the value of his services in transferring from the other district courts and docketing in the Superior District Court some fifteen hundred tax suits, and obtained judgment in his favor for the sum of fifty cents per suit on all of said suits; Held—That the extra compensation allowed the clerk in this instance was not authorized by law.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Frank N. Butler*, for plaintiff and appellee. *George S. Lacey*, city attorney, for defendants and appellants.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

WYLY, J. The plaintiff sued for the value of his services in transferring from the other district courts and docketing in the Superior District Court some fifteen hundred tax suits, and from a judgment in his favor for the sum of fifty cents per suit on all of said suits.

The city of New Orleans has appealed.

By section 21 act No. 48 of the acts of 1871, it is provided "that clerks of court shall be allowed and permitted to charge two dollars for all proceedings had" in a tax suit.

The extra compensation allowed the clerk in this instance is not authorized by law.

It is therefore ordered that the judgment herein be reversed, and that there be judgment for defendants, plaintiff paying costs of both courts.

* The evidence was admitted by the court *a qua* because it was confirmatory and explanatory of the title filed in answer to the prayer foroyer, not a new and independent title as argued by defendant.—REPORTER.

No. 4609.

STATE OF LOUISIANA v. OSCAR BURNS.

25	302
49	255
49	267

25	302
113	988

Where a motion was made to quash the panel of the jurors, on the ground that the Criminal Sheriff has no legal right to furnish a list of persons liable to jury duty, keep the same in the Criminal Court, and array juries therefrom, because said list should be furnished by the sheriff for the civil courts, in conformity with section 2144 R. S., which says: "It shall be the duty of the sheriff of the parish of Orleans, in the month of December, to furnish a list of all persons liable to jury duty residing within the limits of the parish of Orleans;"

Held—That the sheriff for the Criminal Court is a sheriff of the parish of Orleans, as much as the sheriff for the civil courts, and the constitution makes him the executive officer of the Criminal Court. It is his duty, as such executive officer, to perform the duty imposed by the above law and section 2147 R. S. He is specially and solely the executive officer of that court.

Where a bill of exceptions was taken to the refusal of the judge to charge the jury as requested, that, if they entertained a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they were bound to acquit him, and the judge charged, on the contrary, that the law presumed the sanity of every man and that it devolved on the prisoner, under a plea of insanity, to satisfy the jury by a preponderance of proof that he was insane at the time of the alleged act;

Held—That the exception was properly overruled.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *A. P. Field*, Attorney General, for the State. *J. J. Foley*, for the defendant and appellant.

Justices concurring: Ludeling, Taliaferro, Howell, Wyly, Morgan.

HOWELL, J. The defendant has appealed from a judgment sentencing him to imprisonment at hard labor in the State Penitentiary during his natural life for murder without capital punishment. The case is before us on an assignment of error and two bills of exceptions.

The error assigned is that his application for a new trial should have been disposed of.

The record shows that it was waived.

The first bill of exception is taken to the overruling of a motion made to quash the panel of jurors on the ground that the criminal sheriff has no legal right to furnish a list of persons liable to jury duty, keep the same in the criminal court, and array juries therefrom.

The law is (R. S., sec. 2144): "It shall be the duty of the sheriff of the parish of Orleans, in the month of December, to furnish a list of all persons liable to jury duty residing within the limits of the parish of Orleans."

It is contended that, as the law does not designate the sheriff for the criminal court, whose election is provided for in the constitution, as the officer who is to furnish said list, and as the constitution imposes on the sheriff for the civil courts all duties heretofore devolving on the sheriff of the parish of Orleans, except those therein delegated to the sheriff of the criminal court, the said list should be furnished by the sheriff for the civil courts.

We think this an error. The sheriff for the criminal court is a

State of Louisiana v. Burns.

sheriff of the parish of Orleans, as much as the sheriff for the civil courts, and the constitution makes him the executive officer of the criminal court, and it is his duty as such executive officer to perform the duty imposed by the above law and section 2147 R. S. He is specially and solely the executive officer of that court. The ruling of the judge was correct.

The second bill was taken to the refusal of the judge to charge the jury as requested, that, if they entertained a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they were bound to acquit him, the judge charging, on the contrary, that the law presumed the sanity of every man, and that it devolved on the prisoner, under a plea of insanity, to satisfy the jury by a preponderance of proof that he was insane at the time of the commission of the alleged act.

We think the judge did not err in this charge. The true rule is, "the jury are to be told that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." 2 Greenleaf, § 373; 7 Mst. 500; 3 Parker's Criminal Reports 299-301; 5 Parker ditto 631, 644; Roscoe's Criminal Ev. 952.

Judgment affirmed.

Rehearing refused.

No. 2824.

EDWARD NEWMAN & Co. v. JOHN SMOKER and als.

The common carrier is bound faithfully to perform his duty and he is responsible for the loss or damage resulting to the cargo confided to him, from neglect, imprudence, or want of skill, notwithstanding the stipulation to the contrary in the bill of lading.

But in a case like this, where the shippers or their agents were present at the taking of the cotton on board the boat, and knew from the rain storm then prevailing, that the cotton must necessarily be exposed to the rain and mud, it would be inequitable to permit the owners or their consignees to recover from the boat or its owners, the amount of the damages occasioned by this exposure, when the agent of the shippers accepted the bill of lading, prepared by himself, containing the clause: "The boat not to be responsible for torn bagging, ropes or bands off, wet by rain, old damage or mud."

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. D. C. Labatt*, for plaintiffs and appellants. *R. H. Marr* and *J. N. Brickell*, for defendants and appellees.

Justices concurring: Ludeling, Wyly, Morgan.

WYLY, J. The plaintiffs, who sued the defendants, the owners of the steamboat "Governor Allen," for \$819 37 damages to a cargo of

cotton shipped on said boat from Grand Gulf November 24, 1868, appeal from the judgment rejecting their demand.

It is conceded that the cotton was badly damaged on reaching New Orleans, its destination, and the amount of said damage is not disputed.

The cotton came from Port Gibson by railroad to Grand Gulf, and was there shipped by the agent of the railroad on the "Governor Allen." It was taken on the boat during a severe rain. "The surface of the ground between the warehouse, from which the cotton was taken, and the boat, was covered with water and slushy mud, through all of which the cotton was rolled, a distance of about one hundred yards; on arriving at the landing, the 'Governor Allen' found the 'Belle Lee' occupying the usual landing place, and was compelled to take another position about one hundred feet above the 'Belle Lee.' The 'Belle Lee' occupied her position during nearly the entire time consumed by the 'Governor Allen,' in getting the cotton on board. The cotton was shipped by the P. G. G. G. R. R. Co., two of whose agents and employes were present at the time the cotton was taken on the 'Governor Allen,' one a shipping agent of said railroad; both participated in and assisted the delivery of the cotton to the boat. It was stored on the boat in the usual way, a portion in the engine room, a portion on the guards. That portion on the guards was covered by tarpaulins, except when the boat was engaged in receiving cotton at subsequent landings, and was delivered in New Orleans within forty-eight hours after its receipt on the boat, and thence removed by plaintiffs to the press, in a wet and muddied condition."

It was the water and mud to which the cotton was exposed while being delivered on the boat that occasioned the damage of which the plaintiffs complain.

The bill of lading contained the clause: the "boat not to be responsible for torn bagging, ropes or bands off, wet by rain, old damage or mud."

The common carrier is bound faithfully to perform his duty, and he is responsible for the loss or damage resulting to the cargo confided to him, from neglect, imprudence or want of skill, notwithstanding the stipulation to the contrary in the bill of lading.

But in a case like this, where the shippers or their agents were present at the taking of the cotton on board the boat, and knew from the rain storm prevailing at the time that the cotton must necessarily be exposed to the rain and mud, it would be inequitable to permit the owners or their consignees to recover from the boat or its owners the amount of the damages occasioned by this exposure, when the agent of the shippers accepted the bill of lading (prepared by himself) containing the clause limiting the liability of the boat as aforesaid.

Newman & Co. v. Smoker and als.

Without this limitation it is fair to presume that the boat, under the circumstances, would not have received the cotton, because the clerk testifies that "there was no objection by the shippers, that is, Mr. Kearny, agent of the railroad, to the boat receiving the cotton in the rain and mud. He offered to allow us to take any exceptions that we wanted in the bill of lading; Mr. Kearny brought the bill of lading which was signed by the boat. The effect of the exception was discussed on the boat after the cotton was all aboard, and it was the opinion of all present that the exception was sufficient to cover any damage or losses on the cotton occasioned by wet and mud." * * *

Considering the evidence of this case, we are of the opinion that the court *a qua*. did not err in rendering judgment for the defendants.

Judgment affirmed.

Rehearing refused.

25	305
117	238

No. 2903.

PHILIBERT ROGAY v. J. M. JUILLIARD and LOUIS SCHNEIDER.

Where in the motion to appoint a curator *ad hoc* to the defendant, who is a non-resident, it is simply stated that he is absent and not represented, and where said defendant has not been proceeded against by attachmen, and it has not been alleged or proved that he has or had, when the suit was instituted, any property within the jurisdiction of the court before whom the suit was brought;

Held—That this is not sufficient, and that the suit can not be maintained.

A surety on an arrest bond can not escape his responsibility, because his principal has put himself beyond the jurisdiction of the court.

Where a final judgment was rendered, on the twelfth of April, 1869, against Juilliard, in the case of Juilliard v. Rogay, in which Juilliard had caused Rogay to be arrested on the ground of his departing permanently from the State without leaving therein sufficient property to satisfy the demand of his creditor;

Held—That the prescription of one year can not be opposed by the surety on Juilliard's arrest bond against a suit instituted by Rogay on the fourth of December, 1869, to recover damages for his unlawful arrest in November, 1865, because his right of action did not accrue until the final judgment in his favor was rendered. Besides, it is not an action arising *ex delictu*. It is a suit upon a bond. It is an obligation entered into by the signers thereof, and can, therefore, be considered only as an obligation to be prescribed by the laws regulating the prescription of obligations, and not by the laws regulating the prescription of actions for damages arising from the commission of offenses or quasi offenses.

Where it was objected to the claim for damages that the arrest of plaintiff on the ground that he was departing permanently from the State without leaving therein sufficient property to satisfy the demand against him, was not done with malice, but was the exercise of a mere legal right prosecuted in the form authorized by law, and, therefore, that the defendant could not be responsible on damages;

Held—That this objection is not valid.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. A. & P. J. Robert* for plaintiff and appellee. *Fergus Fuselier*, curator *ad hoc*, for Juilliard. *A. Voorhies* for Louis Schneider, defendant and appellant.

MORGAN, J. In November, 1865, Juilliard instituted suit against Rogay, to recover from him some \$17,000, the value of seventy bales

Rogay v. Juilliard and Schneider.

of cotton, alleged to have been purchased for Juilliard by Rogay, with funds belonging to Juilliard, which cotton, it was alleged, had been received and disposed of by Rogay, the proceeds of sale thereof not having been accounted for.

Alleging further, that Rogay was about to depart, permanently, out of the State, without leaving a sufficient amount of property therein to satisfy his demand, Juilliard applied for and obtained a writ of arrest against him, and furnished his bond, in the sum of \$26,500, to respond to such damages as Rogay might recover, in case it should be decided that the writ of arrest which he had obtained wrongfully issued.

There was judgment in Rogay's favor. See the case of Juilliard v. Rogay, 21 An. 259. This suit is now instituted by Rogay against Juilliard and Schneider, principal and security on the arrest bond, to recover from them ten thousand dollars damages, caused by his wrongful arrest.

He had a judgment for \$1000 against them, *in solido*, and they have appealed.

The first objection is well taken. Juilliard is a non-resident. He has not been proceeded against by attachment, and it has not been alleged, or proved, that he has, or had when this suit was instituted, any property within the jurisdiction of the court before whom the suit was brought. In the petition it is alleged, that although absent, he is represented by an agent, which does not appear to be the fact. In the motion to appoint a curator to represent him, it is simply stated that "the defendant herein is absent, and not represented." This was not sufficient to give the court jurisdiction. It is contended that this case should be governed by the case of Field v. Delta Co., 19 An. 31, but we do not think it applies. In that case it was alleged in the petition, that the defendant, though absent, had property within the jurisdiction of the court. To this petition exception was taken. On the trial of the exception, the allegations were taken as true; and it was upon the ground that the defendant had property within the jurisdiction of the court, that the appointment of the curator was considered proper. None of these facts occur in this case.

As against Juilliard, therefore, the suit should have been dismissed.

It is different as to Schneider. He was the surety on the arrest bond, and is as much bound thereon as Juilliard was. He can not escape his responsibility, because his principal has put himself beyond the reach of the court. He, as well as Juilliard, bound himself to respond to such damages as might be caused by the arrest of the plaintiff, in case it should be decided that the arrest was improperly obtained; and that the arrest was improperly obtained has already been decided, by the final judgment rendered in Rogay's favor, in the suit in which the writ of arrest issued.

Rogay v. Juilliard and Schneider.

To the plaintiff's right of action, he pleads the prescription of one year, alleging that the demand made against him is one sounding in damages. Final judgment was rendered in the case of Juilliard v. Rogay on the twelfth April, 1869. This suit was instituted on the fourth December, 1869. His right of action did not accrue until the final judgment in his favor was rendered. Besides, this is not an action arising *ex delictu*. It is a suit upon a bond. It is an obligation entered into by the signers thereof, and can, therefore, be considered only as an obligation, to be prescribed by the laws regulating the prescription of obligations, and not by the laws regulating the prescription of actions for damages arising from the commission of offenses or quasi offenses.

His real objection is, that inasmuch as the suit of Juilliard v. Rogay was not prosecuted with malice, but was the exercise of a mere legal right, prosecuted in the form authorized by law, he can not be held responsible therefor. He relies on art. 212, C. P., which prescribes that "any creditor, whose debtor is about to leave the State, even for a limited time, without leaving in it sufficient property to satisfy the judgment which he expects to obtain in the suit he intends to bring against him, may have the person of such debtor arrested and confined, until he shall give sufficient security that he shall not depart from the State without the leave of court."

This article does not give to the party claiming to be a creditor the right to arrest his debtor, under the conditions therein stipulated; but this right is coupled with the obligation of responding in damages to the party arrested, in case it should be determined that the arrest was improperly ordered; and it is the existence of indebtedness which gives rise to the remedy of arrest. If no debt existed, the arrest would have been illegal; and the judgment in the case is the test of the existence of the debt.

It would be something intolerable, if any person, pretending to have a claim against his neighbor, could cause him to be arrested because he proposed leaving the State, and, when it should have been decided that he had no cause of complaint against him, shield himself from a demand for damages upon the plea that he was not actuated by malice—that he meant to do no harm. A man's liberty is too sacred a right to be thus trifled with.

In the present case the plaintiff was in this city on his way to France, where he proposed to invest what means he had in some of the manufactured articles of that country, which he proposed to bring here. He was arrested at the suit of Juilliard, Schneider becoming surety on Juilliard's bond, which was required before the writ of arrest issued. Rogay was taken to prison, where he remained for more than two days and nights. He was then only released upon giving heavy bonds, and

 Rogay v. Juilliard and Schneider.

to secure his bondsman from loss he pledged with him all the property he had. His means being thus locked up, he could not have left here even if he would have been allowed to do so. Although out of jail he was still practically a prisoner in New Orleans, and paralyzed in every commercial way. The suit was decided in his favor. The best evidence of his intention to go to France, buy goods and return here is, that as soon as the case was decided for him he did go to France, and shortly after returned here. While his property remained subject to the obligation of his bondsman it depreciated largely in value; during his stay here, pending the suit, he necessarily was at an expense. To defend his suit, according to his own testimony, which is uncontradicted, he spent \$500 in counsel fees and several hundred dollars more in procuring documentary evidence and the depositions of witnesses away from New Orleans. The judge of the lower court gave him a judgment for \$1000, and we do not see how he could have awarded him any less.

As to Juilliard, as we have before said, he can not be condemned, because he is not properly before the court.

It is therefore ordered, adjudged and decreed that the judgment of the lower court in so far as it renders a decree against Juilliard be annulled, avoided and reversed, and the suit as against him be dismissed.

It is further ordered, adjudged and decreed that as against Schneider the judgment be affirmed, Schneider to pay the costs in both courts.

Rehearing refused.

 No. 4488.

JEAN B. LECHE v. J. B. A. CLAVERIE.

Where the occasion of the discharge of the plaintiff was a quarrel between said plaintiff and defendant commenced by defendant, during which insulting expressions were used by both;

Held—That, as the employer was in fault, he should not be permitted to discharge his employe without paying him for the whole term for which he was employed.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Beauvais, J.* Trial by jury. *Nichols & Pugh* for plaintiff and appellee. *R. N. Sims* for defendant and appellant.

LUDELING, C. J. The plaintiff alleges that he was employed by the defendant to oversee his plantation during the term of three years at three thousand dollars, payable in annual installments of one thousand dollars; and that the defendant discharged him, before the expiration of the term of his contract without legal cause, and he prays for judgment against him for the price stipulated for the whole term of the contract.

Leche v. Claverie.

There was a trial by jury, who found a verdict for the plaintiff, and the judgment was rendered in accordance with the verdict.

The evidence sustains the verdict and judgment. The occasion of the discharge of the plaintiff was a quarrel between the plaintiff and defendant, commenced by the defendant, and during which insulting expressions were used by both. As the employer was in fault, he should not be permitted to discharge his employe without paying him for the whole term for which he was engaged.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 4071.

STATE ex rel. BOARD OF STATE ASSESSORS v. JAMES GRAHAM, State Auditor. State of Louisiana intervenor.

Where the State Assessors have delivered to the Auditor the assessment roll and received in full their compensation for their services, the contract between them and the State for making the assessment is completely executed. The obligation of the State to pay them is discharged, and it can not afterwards be revived by any use the Auditor might make of said roll.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. E. Filleul* and *John B. Howard*, for relators. *Hornor & Benedict*, for respondent. *S. Belden*, Attorney General, for State of Louisiana, intervenor.

WYLY, J. The relators filed a motion to dismiss this appeal on the consent of S. Belden, Attorney General; but before that motion was acted on, Mr. Belden's term of office expired, and his successor, the present Attorney General, withdrew the consent, as he had the right to do; the motion is therefore denied.

The State having paid the relators \$114,978 65 for making the assessment of the parish of Orleans for the year 1871, is now sought to be held liable to them for \$47,464; and for this amount the relators seek by mandamus to compel the Auditor to issue to them State warrants. The defense is: The relators, as State Assessors for the parish of Orleans, have received as compensation in full \$114,978 65; that said sum is the total compensation to which they were entitled under existing laws; that the assessment roll, delivered to the Auditor before the close of the year 1871, after the payment of the assessors as aforesaid, became the property of the State; and the use of said roll by the Auditor as a basis upon which to levy a tax or taxes, subsequent to the deposit and payment as aforesaid, does not entitle the relators to the compensation herein demanded.

The court gave judgment for the relators, rendering the mandamus peremptory, and the defendant appeals. It is admitted that the rela-

State ex rel. Board of State Assessors v. Graham, State Auditor.

tors received after the delivery of the assessment roll on the fifteenth of November, 1871, \$114,978 65, "the total amount due at five per cent. on the face of the assessment roll."

The question is: Are the relators, after making this settlement, entitled to demand the additional compensation of five per cent. on the total amount of the "interest tax" fixed by the Auditor in January, 1872, on the assessment roll of 1871?

We think not. When the relators delivered to the Auditor the assessment roll and received in full compensation for their services \$114,978 65, the contract between them and the State for making the assessment for the parish of Orleans for the year 1871, was fully executed. The obligation of the State to pay them was discharged; and it could not afterwards be revived by any use the Auditor might make of said roll.

Regarding this settlement as conclusive between the parties, in the absence of fraud or error, we will not look beyond it to see whether the relators are entitled to a percentage on interest tax or not.

It is therefore ordered that the judgment herein be annulled, and it is now ordered that the mandamus be disallowed and the demand of the relators be rejected with costs of both courts.

No. 4558.

STATE ex rel. HENRY SHORTEN v. BOARD OF SELECTMEN of the City of Baton Rouge.

Where the Board of Selectmen of a city have the right to be the judges of their own election and of that of their officers, it is not merely a ministerial duty which they have to perform, it involves discretion and a mandamus can not be used to enforce the performance of a discretionary duty.

Where the relator sought by mandamus to compel the Selectmen of the city of Baton Rouge to issue to him a certificate of election and to recognize him as mayor of that city, on the ground that the election commissioners had decided he was elected, and that the Selectmen can not determine that he was not elected, because no one but a judge can decide the question;

Held—That the Board of Selectmen can, under the eighth section of the city charter, exercise their discretion so far as to determine the relator's right to the certificate, and that the use of this discretion is not the exercise of judicial powers in the sense of the constitution, and therefore not repugnant to the article ninety-four of that instrument.

The action of the Board of Selectmen is not conclusive of the rights of the relator. He can sue for the office, but he can not proceed by mandamus.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. J. C. Stafford*, for relator and appellee. *F. A. Gallagher*, for respondents and appellants.

WYLY, J. Henry Shorten, claiming that he was elected Mayor of the city of Baton Rouge at the April election of 1872, seeks by mandamus to compel the defendants, the Board of Selectmen of Baton Rouge, to issue to him a certificate of election, to recognize him as

State ex rel. Shorten v. Board of Selectmen of the city of Baton Rouge.

Mayor, and to deliver to him the books, papers and other documents pertaining to said office.

From the judgment making the mandamus peremptory the defendants have appealed.

The important question is, can the defendants be compelled by mandamus to issue the certificate of election to the relator? Is this merely a ministerial duty? We think not. Because by the eighth section of the city charter, "the Board of Selectmen shall be the judge of their own election, and that of all the officers elected under the provisions of this act." The respondents were therefore authorized to consider the returns of the commissioners of the election, and to determine who were elected, before issuing certificates of election to the officers elected under the provisions of the city charter. This involved the exercise of a discretion. A mandamus can not be used to enforce the performance of a discretionary duty. But the relator contends that the eighth section of the charter is repealed by article 94 of the constitution, forbidding the exercise of judicial powers by any other officers except those mentioned under the title of "Judicial Department." If this be true, who is to determine whether the relator was elected Mayor, or so far decide the question as to authorize the issuance of the certificate of election? If the respondents can not determine relator's right to the certificate by reason of the constitutional inhibition, how can the commissioners of election do so? How can the relator get the office, if no officers but a judge can determine from the returns that he was elected? He does not pretend that any judge has determined his right to the certificate. It is difficult to perceive the force of respondent's logic, when he contends that he is entitled to the office of mayor because the election commissioners have decided he was elected, and the respondents can not determine that he was not elected, because no one but a judge can decide the question.

We apprehend that the Board of Selectmen can, under the eighth section of the city charter, exercise their discretion so far as to determine the relator's right to the certificate; and the employment of this discretion is not the exercise of judicial powers in the sense of the constitution, and therefore not repugnant to article 94. The action of the Board of Selectmen is not conclusive of the rights of the relator. Like every other suitor, he has a legal remedy; he can sue for the office, but he can not by mandamus compel officers vested with discretionary power to employ it in his behalf.

With only the commissioners' returns, and without any evidence of his title to the office, the relator can not, in this proceeding, compel the respondents to recognize him as Mayor, and deliver to him the books, papers and other property appertaining to said office.

It is therefore ordered that the judgment herein be annulled, and that this suit be dismissed at the costs of relator.

No. 2815.

CHARLES BELL v. R. H. SHORT & CO. BATTLE, THORN & CO., Garnishees.

Where, on execution being issued in this case, Battle, Thorn & Co. were made garnishees by addressing the citation to said firm and serving the same on H. A. Battle, a member thereof, who answered the interrogatories under oath, but signed the name of the firm to the answers, instead of signing his own;

Held—That the answers were sufficient and that the interrogatories could not be taken for confessed. He answered in the precise name in which he was cited. If the plaintiff wished him to sign his individual name to the sworn papers, the citation should have been addressed in that name.

The answers were under oath, and could, if untrue, subject the garnishee, H. A. Battle, to a prosecution for perjury. This is the test.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Given Campbell*, for plaintiff and appellee. *J. M. Coon* and *Semmes & Mott*, for R. H. Short, appellant. *E. Woolridge*, for Battle, Thorn & Co., appellants.

TALIAFERRO, J. In the case of Charles Bell v. R. H. Short & Co., just decided on appeal, the plaintiff having judgment in his favor in the court below, issued execution and caused garnishment process to issue against the garnishees in this case.

Their answers being made to the interrogatories propounded to them, a rule was taken by the plaintiff against them to show cause why the interrogatories should not be taken *pro confesso*. The rule being made absolute the garnishees appealed.

We think the court erred. The answers are concise but clear and explicit; and we think fully responsive to the interrogatories.

It is therefore ordered and adjudged that the judgment of the district court be annulled, avoided and reversed. It is further ordered that judgment be and is hereby rendered in favor of the garnishees, the plaintiff and appellee paying costs in both courts.

ON APPLICATION FOR A REHEARING.

WYLY, J. The plaintiff having judgment against the defendants for \$1048 46, issued execution and made Battle, Thorn & Co. garnishees by addressing the citation to said firm and serving the same on H. A. Battle, a member thereof, who answered the interrogatories under oath, but signed the name of the firm to the answers, instead of signing his own.

On motion the answers were decreed insufficient and the interrogatories taken for confessed.

From this judgment the garnishees appeal.

We think the court erred. The answers are clearly responsive to the interrogatories. As to the objection that H. A. Battle signed the

 Bell v. Short & Co.

firm name to his sworn answers instead of his individual name, we think that is no reason why his answers should be rejected and the interrogatories be taken for confessed.

He answered in the precise name in which he was cited to answer the interrogatories. If plaintiff wished him to sign his individual name to the sworn answers the citation should have been addressed in that name.

But after all the test is, were the answers under oath; and would they, if untrue, subject the garnishee, H. A. Battle, to a prosecution for perjury? In our opinion they would.

It is therefore ordered that the judgment heretofore rendered by this court remain undisturbed.

Rehearing refused.

 2909.

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R. SEMPLE YOUNG v. SCOTT & CAGE AND C. CAVAROC.

A factor can not secure his individual creditor by pledging the planter's cotton which has been confided to him for sale. That power is not conferred by act No. 150 of the acts of 1868, entitled "An Act to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton presses, wharfingers and others." There is nothing in the statute showing any intention of the legislator to enlarge the powers of factors, or to give them the right to pledge the property confided to them for sale.

APPEAL from the Fourth District Court, parish of Orleans. *Théard*, J. *A. Voorhies* and *F. Fuselier*, for Cavaroc, appellant. *Hays & New*, for Scott & Cage. *Labatt & Aroni*, for plaintiff and appellee.

WYLY J. About the twenty-sixth of December, 1869, Scott & Cage, cotton factors, received from the plaintiff sixty-four bales of cotton for sale, he not owing them anything. On the twenty-ninth they suspended, and on the same day pledged the cotton to their creditor, C. Cavaroc, or C. Cavaroc, president of the Bank of New Orleans. The plaintiff sequestered the cotton, and it was subsequently released on bond.

The court gave judgment for the plaintiff, recognizing his ownership of the property and maintaining the sequestration.

From the judgment C. Cavaroc appeals.

The question is: can a factor secure his individual creditor by pledging the cotton of the planter which has been confided to him for sale? We think not. This court has frequently decided that the factor can not pledge, or give in payment of his own debts, property intrusted to him for sale. 17 La. 166; 1 An. 74; 19 An. 300.

But the appellant contends that that power is conferred by act No. 150 of acts of 1868, entitled "An act to prevent the issue of false re-

Young v. Scott & Cage and Cavaroc.

receipts or bills of lading, and to punish fraudulent transfers of property by cotton presses, wharfingers and others." If such a power were conferred by that act it would be void, because it is not covered by the title. Constitution, article 114. But we do not consider that act should be interpreted as contended for by the appellant.

It is the intention of the lawgiver which we must seek out and give effect to; and there is nothing in the statute showing any intention to enlarge the powers of factors or to give them the right to pledge the property confided to them for sale.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 4532.

WILLIAM J. RUSK, Administrator, v. WARREN, CRAWFORD et als.

Where there is community between husband and wife, the husband is the head of it, and is responsible for the debts of the community. The death of his wife does not deprive him of the right to make *bona fide* settlements for the payments of the debts of the community, nor do such settlements novate the debts as to the community. The community property is liable for the community debts.

A PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Butler, J. Waddill & Barbin*, for plaintiff and appellant. *Irion, Cullom & Walsh*, for defendants and appellees.

LUDELING, C. J. The debts, which are the basis of the judgments enjoined in this suit, were created during the existence of the community of acquets and gains between N. R. Selser and his wife, Martha Stampley. After the death of his wife, he continued to control and administer the property of the community, without any administration upon the succession of his wife. While thus controlling the community property after the death of his wife, he renewed the notes given by him during her life, and subsequently the holders of the notes obtained judgments against him individually; and, having seized and sold his undivided interest of the community property, they caused the other half interest to be seized to satisfy said judgments. In the meantime, one of the heirs of the deceased wife was appointed administrator of the succession, and he has enjoined the sale.

The plaintiff in injunction contends that by taking new notes and judgments thereon against the husband personally, after the death of the wife, the debts were extinguished by novation. We do not think so. The husband was the head of the community and he was responsible for the debts of the community; the death of his wife did not deprive him of the right to make *bona fide* settlements for the payment of the debts

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Rusk, Administrator, v. Warren, Crawford et als.

of the community, nor did such settlements novate the debts as to the community. The community property is liable for the community debts. *Lawson v. Ripley*, 17 La. 274; 23 An. 424.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

No. 2344.

M. N. RADOWITCH v. A. H. SIEWERD and als.

Where it was established that the plaintiff, master of a boat, was authorized by his employer the captain of the boat, to collect freight bills of a certain amount which he held, with the understanding that said plaintiff accepted said amount of bills in settlement of his wages amounting to four hundred and sixteen dollars and fifteen cents, and advances to his employer amounting to two thousand dollars, and that said employer or the boat would make the amount of the bills good, if they could not be collected, and where it was admitted that plaintiff collected one thousand and thirty-eight dollars and thirty-five cents;

Held—That of the sum thus collected there should have been imputed the amount due for the payment of plaintiff's wages, as the privileged claim.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Bentinck Egan*, for plaintiff and appellee. *Albert Voorhies*, for defendants and appellants.

TALIAFERRO, J. The plaintiff sued the defendants, Siewerd & Kip, *in solido*, for seven hundred dollars, being, as he alleges, for wages due him as master of the steamer A. G. Brown, owned by the defendants. These services he alleges were rendered from the twenty-first of October, 1868, to the twenty-ninth of December of the same year, when he was discharged by the defendants without good cause. He claimed a lien and privilege on the boat and caused her to be sequestered.

A judgment by default was entered against Kip, which was made final on the twentieth of February, 1869. A *fi. fa.* was issued against Kip, which was returned *nulla bona*. To the petition sued on Siewerd the defendants answered on the twenty-sixth of January, 1870. But on the sixth of March, 1869, after the default judgment was made final against Kip on the twentieth of February, 1869, both defendants filed a suit in the Seventh District Court to annul that judgment. On the third of April following they filed a supplemental petition for an injunction to restrain execution from issuing against them.

This contestation went on until the twenty-first of January, 1870, when judgment was rendered annulling the judgment of twentieth of February, 1869, against Kip; but the decree restored and reinstated the proceedings in that case to the status they were in on the eighteenth of January, 1869, carrying things back to a period anterior to the time of the final judgment against Kip, thenceforth to be proceeded with according to law and the rights of the parties.

The defendants answered in the original suit, as we have seen, on

Radowitch v. Slewert and als.

the twenty-sixth January, 1869, denying the allegations of the plaintiff, and specially alleging that the plaintiff's services, as master of the "A. G. Brown," were rendered to Captain Bassett, who had previously chartered the boat, to the knowledge of the plaintiff; that plaintiff and Bassett had entered into partnership in running the boat, and that the plaintiff had contracted with Bassett to render the services he claims to have rendered. They deny that they ever assumed to pay this debt due by Bassett, or that they are in any manner bound for it. There was judgment for the plaintiff for the sum of \$465, and the defendants have appealed. We find the facts to be that Bassett chartered the "A. G. Brown" on the twenty-fourth January, 1868, for one year, to run from the first of February, 1868, to the first of February, 1869. On the twenty-sixth of October, 1868, Bassett and the plaintiff, Radowitch, entered into a contract containing various stipulations, among them, one by which Bassett bound himself to employ Radowitch as master of the steamer, and to pay him for his services in that capacity the sum of two hundred and fifty dollars per month, to the first of February, 1869. About the first of January, 1869, the A. G. Brown, by collision with another steamer, went down, and proved a total loss. On the eighteenth of January, 1869, a settlement was made between Bassett and Radowitch. The latter, upon entering into the contract with Bassett, to which we have adverted, loaned the latter \$2000. The sum of \$464 15 was fixed as the amount of wages due the plaintiff. It was arranged that Radowitch should take for collection, to pay himself, fifty-seven freight bills due the boat. The written act of the parties in relation to this matter is in these words:

"NEW ORLEANS, January 18, 1869.

"I hereby authorize Captain M. N. Radowitch to collect freight bills which he holds, to the amount of twenty-four hundred and sixty-four dollars and fifteen cents, of the steamer A. G. Brown; the condition of this receipt is, that Captain Radowitch accepts the above amount in bills in settlement of wages and advances to Captain Bassett on steamer A. G. Brown. It is also understood that any errors or bills that are not collectable in above amount, said Bassett will make good, or steamboat A. G. Brown.

"(Signed)

A. P. KIP,

W. S. BASSETT.

O. CANTON,

M. N. RADOWITCH."

It is important in adjusting this controversy to ascertain the preponderance of testimony in regard to the true intention of the parties in making this settlement and as to the manner its terms were carried out.

A considerable amount of testimony was taken regarding the value and availability of this lot of freight bills. Radowitch presented a tabular statement of the amounts he collected and of the amounts not paid. He is very clear and direct in his testimony that he collected

Radowitch v. Siewerd and als.

all that could be collected out of the entire number of bills he received and gives the total collected at \$1038 35. He is equally distinct in asserting and reiterating that he was to credit what he collected, and any deficiency that might arise was to be made good to him.

The defendants, Siewerd & Kip, contend that the wages were to be paid by Bassett, and that they were in no manner bound for them. How they became bound unless it be by certain admissions we shall presently consider, we have been at a loss to ascertain. The boat it seems went into the possession and control of Bassett under the charter party about the first of February, 1868. Radowitch had nothing to do with the boat until the twenty-sixth of October following, and by the written agreement between him and Bassett the latter was to pay his wages.

Yet Radowitch sues Siewerd & Kip for the wages and for the time he had charge of the boat for Bassett, or rather on joint account. In his own evidence in the original suit against the defendants he does not say that they employed him, nor that they discharged him. Neither does his witness, Dockter, say anything on the subject. His allegations that the defendants employed him and discharged him are not made good by proof. In his reasons for refusing a new trial, the judge *a quo* seemed to think that by the contract entered into on the twenty-sixth of October, 1868, between Radowitch and Bassett, the defendants became not only proxies but parties to that contract, and made themselves co-obligees with Bassett. By examining the contract of the twenty-sixth of October, 1868, between Radowitch and Bassett, it appears that Siewerd & Kip intervened, but it seems they intervened only to bind themselves to sell the steamer to Radowitch on the same terms they had bound themselves by the charter party to sell to Bassett, if the latter should not conclude to buy and the former did. Bassett in his contract with Radowitch was to turn over to him the option or preference to purchase if he himself declined, and Radowitch chose to purchase, Siewerd & Kip intervening to bind themselves to sell to Radowitch on the same terms they were bound to sell to Bassett. We do not construe this intervention as going any further, or to extend to any other matter.

In their suit to annul the judgment of the twentieth February, 1869, the defendants make the following statements, which are sworn to:

“Your petitioners aver that on the nineteenth of January, 1869, a settlement and compromise was made between the said Radowitch and William S. Bassett in behalf of petitioners, by which it was agreed that the above mentioned suit would be discontinued by the plaintiff therein; that the consideration of said compromise was the transfer for collection of fifty-seven bills or accounts, due by divers parties to the said William S. Bassett, for the aggregate sum of \$2464 15, as will

Radowitch v. Steward and als.

more fully appear by reference to the annexed list, made a part of this petition; that said Radowitch has proceeded with the collection of said claims, and has actually collected an amount more than sufficient to pay the claim due him by petitioners, which claim, instead of being the sum of \$700, was liquidated to the amount of \$464 15."

It is strenuously urged on the part of the plaintiff that these declarations of the defendants amount to judicial confessions which ought to conclude the plaintiff. Taking into view all the facts elicited by the evidence, we are not inclined to consider these declarations in that light. It seems clear to us that there existed no personal obligation on the part of the defendants to pay the plaintiff's claim for wages. For the amount of these wages he had a lien and privilege on the steamer, which he might have enforced had she not been lost. We can take the defendants' declarations in no other sense than as importing a liability upon their boat, arising from the lien of the captain for his services. Of the sum collected by him, \$1038 35, the amount due the plaintiff (\$416 15) for wages, should have been imputed to the payment of the privileged claim.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendants, the plaintiff and appellee paying costs in both courts.

Rehearing refused.

No. 2863.

VINCENT BATTALORA *v.* ALBERT ERATH and als., and D. S. RAMELLI
v. ALBERT ERATH and als. (Consolidated.)

Where the appeal was taken by the plaintiff from a judgment dissolving an injunction without damages, and in his petition of appeal plaintiff prayed for citation against the defendants only;

Held—That the motion to dismiss the appeal on the ground that all the parties in interest were not made parties to the appeal, must be overruled. It was not necessary that the surety on the injunction bond should have been made a party to the appeal.

Whether there was a consideration or not between the makers and the payee of certain promissory notes, the makers were liable to the indorsees who acquired the notes before due and gave a valuable consideration therefor.

Whether a blank was filled up, before or after the signing of the notes, can not affect the indorsees who knew nothing thereof and who acted in perfect good faith.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Mitchel & Brice* and *Race, Foster & Merrick*, for plaintiffs and appellants. *Gustavus Schmidt*, for defendants and appellees.

ON MOTION TO DISMISS.

LUDELING, C. J. We are asked to dismiss this appeal on the ground that all the parties in interest are not made parties to the appeal.

Battalora v. Erath and als., and Ramelli v. Erath and als.

The appeal is taken by the plaintiff from a judgment dissolving an injunction, without damages. In his petition of appeal he prayed for citation against the defendants only. It is contended that the surety on the bond should have been made a party to the appeal. We can not imagine why? For if cited there could be no change made in the judgment, as between the appellees.

In the case of *B. Avegno v. S. Johnson*, G. Metz subrogated, 22 An., it was said that it is "the settled jurisprudence of this court that the surety on an injunction bond is a necessary party to an appeal." The principle was, too, broadly stated that the surety was a necessary party in that case, which was an appeal from a judgment in favor of the plaintiff perpetuating an injunction. He had an interest in maintaining that judgment. But it is different in a case where the judgment dissolves the injunction without damages, and the plaintiff alone appeals.

The additional grounds filed on fifteenth November, 1870, came too late. and can not be considered. 12 An. 745.

It is therefore ordered that the motion be overruled.

ON THE MERITS.

WYLY, J. In 1865 Samuel Fasnacht and Louis Fasnacht sold their brewery in this city to Albert Erath, and in evidence of part of the price took two notes for \$5000 each, one made by V. Battalora and the other by D. S. Ramelli, payable to the order of said Albert Erath, who indorsed and delivered them before due. They were not paid at maturity, and the notes which form the subject of this controversy were given by the same parties in renewal thereof. A few days before the maturity of these notes, Battalora and Ramelli enjoined the defendants, Erath and Samuel and Louis Fasnacht, from transferring or disposing of said notes, on the ground that the same were executed without consideration, and with the assurance that the makers were not intended to be held liable, and that they were made and given merely as a matter of form. Samuel and Louis Fasnacht in their answers reconvened, and prayed judgment for the amount of the notes. The court in both these cases dissolved the injunction, and gave judgment in reconvention, as prayed for. The plaintiffs appeal.

An examination of the evidence satisfies us that the court did not err. Whether there was a consideration or not between the makers and the payee, the makers are liable to the indorsees, Samuel and Louis Fasnacht, who acquired the notes before due, and gave a valuable consideration therefor. Whether the blank was filled up, fixing the rate of interest, before or after the signing, can not affect the indorsees, who knew nothing thereof, and who acted in perfect good.

Battalora v. Erath and als., and Ramelli v. Erath and als.

faith, giving the indulgence and allowing the renewal upon the understanding that the notes were to bear eight per cent interest. Indeed, the whole defense seems to be utterly without merit, and the appeal was doubtless for delay. There should be damages for frivolous appeal, as prayed for.

It is therefore ordered that both of the judgments herein be affirmed with costs, and that ten per cent damages be added to the amount of each judgment.

Rehearing refused.

No. 2926.

JOSEPHINE HALE, Executrix, v. WILLIAM J. SALTER et als.

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A suit by the executor of a succession to compel the heirs of said succession who have been put in possession thereof, to pay the commission claimed by said executor, is properly brought before another court than the Second District Court, which has only probate jurisdiction.

Where the exception was, that plaintiff, having claimed in her first petition only one-half of the commission allowed by law to executors, could not, in a supplemental one, claim the whole commission;

Held—That she had the right to amend her pleadings, and that the exception could not be maintained.

The law gives to the executor a compensation for his services, and the heirs can not deprive him of it by causing themselves to be put in possession after the executor has accepted the trust and qualified.

Where it was contended by the heirs that the executor's claim for his commission had lapsed, because it was not demanded when the succession was turned over to them;

Held—That if he did renounce his claim, his renunciation should have been express. It can not be inferred.

Where the heirs contended that they could not be called upon to pay plaintiff's claim, because the law provides that the commissions of executors are based on an inventory, and no inventory was taken in this case, wherefore there are no means by which the amount due to the plaintiff can be ascertained;

Held—That the heirs can not by their own act prevent the executors from taking an inventory, and then refuse to pay them their commission. The executors should be allowed to show the value of the succession *aliunde*.

Where letters testamentary have been issued by a court of competent jurisdiction to two executors, on their complying with the requisites of the law, and one of them takes the oath well and faithfully to perform his duties, as executor, and the other does not, the one who has not taken the oath is presumed to have renounced the trust, and the one who has qualified is entitled to the entire commission.

A PPEAL from the Sixth District Court, parish of Orleans. *Cookey, J. Gibson & Austin, Labatt & Aroni*, for plaintiff and appellee. *T. Gilmore & Sons*, for defendants and appellants.

MORGAN, J. Richard Salter appointed Thomas Hale and Peter Marcy executors of his last will, and made them detainers of his estate. After his death the will was probated, and immediately thereafter the executors named presented their joint petition to the judge of the Second District Court of New Orleans, where the succession was opened, in which they prayed to be allowed to qualify as executors;

they also prayed for an inventory. Their prayer was granted. Thomas Hale alone took the usual oath.

Before the inventory was commenced the heirs of Salter, all of age, brought suit against Hale and Marcy, executors, alleging that they were willing to pay the debts of the succession which had fallen to them, and the only legacy left by their ancestor, and alleging that there was no need of an administration of the succession, prayed to be put in possession of the estate.

Hale and Marcy, in the same answer, said that they made no objection to the granting of petitioners' prayer, and submitted themselves to the judgment of the court. The heirs were ordered to be put in possession; and thus the duties of the executors came to an end, without their having taken an inventory, filed an account, or done any act of administration in the usual sense of the term.

Hale died, and his widow, and executrix of his will, has instituted this action against the heirs of Salter, claiming, in behalf of her husband's succession, the executor's commission of two and one-half per cent. on the value of the Salter succession. She claims the whole commission allowed by law, because her husband alone qualified, that is, took the oath as executor.

The defendants except to the jurisdiction of the court of the first instance *ratione materiæ*, claiming that they should have been proceeded against in the Second District Court, which has exclusive jurisdiction of the probate of wills, the appointment of executors and the rendition of their accounts to the Second District Court.

It is because of this exclusive jurisdiction of the Second District Court that it was proper to institute this proceeding before another tribunal.

This is not a suit for the probate of a will, the appointment of an executor, or the rendition of an account. It is an action to compel the heirs of Salter to pay an obligation which, it is alleged, they assumed when they took the succession of their father out of the hands of his executors. It could not therefore have been instituted in the Second District Court, which has only probate jurisdiction.

It was next excepted that plaintiffs' petition discloses no cause of action. The plaintiffs may not succeed in their case, but it seems to us that when they allege an indebtedness on the part of the defendants for the causes herein declared upon, they set forth a sufficient cause of action to authorize a judicial investigation of their claim.

The third exception is, that in her first petition plaintiff only claimed one and one-quarter per cent., or one-half of the commissions allowed by law to executors, and that her supplemental petition claiming the whole commission should not be considered. Whether she is entitled to the whole of the commission or not is a question which will be

Josephine Hale, Executrix, v. Salter et als.

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treated of in another part of this opinion. But we think she had the right to amend her pleadings, which is always in the discretion of the court when the cause of action is not thereby changed, and to claim more in her supplemental petition than she did in her first petition.

The defense to the demand on the merits is, first, that no commissions are to be allowed an executor who has not administered upon the estate intrusted to him, and in support of this proposition we are referred to articles 1069, 1194, 1200, 1201, 1682, 1685 of the Civil Code, which provide that the administrator of a succession shall be allowed on the settlement of his account a certain per centage on the amount of the inventory of the effects of the succession committed to his charge; that the curator is entitled to a certain per centage on the amount of the effects of the succession, or of the portion by him administered according to the inventory; that if, at the rendition of his account by the curator, the judge be satisfied that the succession is entirely settled, he shall allow the curator a certain commission on the amount of the inventory of the effects of the succession, or of the portion by him administered, deducting bad debts; that if the succession is not entirely settled, and the administration thereof prolonged, the curator shall only be allowed commissions on the sums received or recovered during his administration; that an executor who has the seizin of the succession is entitled to a commission for his trouble and care on the whole amount of the inventory, making a deduction for what is not productive and for what is due by insolvent debtors; and the argument is that the commission allowed to executors, upon whom a general seizin is conferred, is not in the nature of a bequest or legacy, but is allowed, solely and exclusively, as a compensation for their care and trouble in administering the estate, and only in so far as they have administered. In support of this principle which, it is contended, runs through the jurisprudence of the State, we are referred to Succession of Day, 3 An. 624; Dupuy, 4 An. 570; Nicholson, 5 An. 358; Poindexter, 19 An. 22; Vogel, 20 An. 81; Day, 22 An. 366; 1 R. 400; 4 An. 388; 6 An. 486.

We have carefully examined the authorities cited, but we have not found among them all one which throws any light upon the question which we are called upon now to decide; nor have our own researches enabled us to find a case which positively governs the one at bar. What we are called upon to determine is this:

When an executor, with seizin, has accepted the trust reposed in him, and, in order to carry out the provisions of the will of which he is the executor, and otherwise administer upon the estate, obtains an order from the court of competent jurisdiction for the taking of an inventory of the property of the succession, and the heirs, before the inventory is taken bring suit against him to be put in possession of

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their estate, offering to pay the debts and legacies, and he answers that he makes no objection to their demand, and judgment is rendered in their favor, is he precluded from claiming from the heirs the commissions which the law fixes as his compensation for his care and trouble in administering the property of the succession ?

We decide the question in the negative.

A testator has the right to give the seizin of his estate to his executor. The acceptance of this trust creates obligations on the part of the executor, for discharging which he is allowed compensation by law. His obligations are to carry out the provisions of the will, to take charge of the property of which the seizin gives him possession, and, after the performance of these duties, to deliver the succession over to the heirs. His compensation for the performance of these obligations is two and a half per cent. on the estimated value of the property belonging to the succession thus placed in his possession. The moment he accepts the trust, his obligations and responsibilities begin; the moment his obligations and responsibilities begin, his right to compensation attaches, and remains until discharged, and this without reference to the time the succession was in his hands. The heirs can at any time take the seizin from the testamentary executor on offering him a sufficient sum to pay the movable legacies. C. C. 1654. They may at any time accept the succession which has fallen to them and be put in possession thereof upon complying with the requirements of the law, but they can not do this without discharging the obligation due to the executor. The fact that the executor is willing to give up his trust immediately to the rightful heirs without forcing them to a litigation, and without entailing upon the succession the necessary costs of a tedious administration, is rather a reason why the executor's fees allowed by law should be paid without hesitation, than an excuse for not paying them at all. Be this as it may, the law gives to the executor a compensation for his services and responsibilities, and the heirs can not deprive him of it by causing themselves to be put in possession, after the executor has accepted the trust.

The heirs argue that the executors' claim for their commission has lapsed because they were not demanded when the succession was turned over to them. We do not think they have succeeded. If they did renounce, their renunciation must have been express; it is not to be inferred. So far at least as Hale is concerned, it is certain that he never renounced, for these commissions seem to have occupied his thoughts during the last days of his life.

In an addenda to written advice given in prospect of death to his wife under date of twenty-ninth of November, 1866, he mentions them thus :

“ Note.—Salter commissions due me.”

Thus showing that he considered them as a part of his estate. We therefore are of opinion that the executors' commissions are properly due.

The heirs contend that they can not be called upon to pay, because the law provides that the executors' commissions are based upon an inventory, and that as no inventory was taken there are no means by which the amount due them can be ascertained. We think the heirs can not, by their own act, prevent the executors from taking an inventory, and then refuse them their commission, because the inventory was not taken.

The executors should be allowed to show the value of the succession *aliunde*. The best evidence of the value of the succession is the estimate which the heirs put upon it. This evidence was introduced. The heirs objected to its reception and reserved their bill, but the court admitted it, and we think the ruling was correct. The heir, a witness in the case, who seems best informed upon the subject fixes the value of the estate, in round numbers, at \$100,000. We have no idea that he over estimated its value, and we think the executors' commissions must be reckoned on that basis.

The last question presented for our decision is this: If there are two executors to a will, both of whom unite in a petition to the court having jurisdiction over the succession confided to their charge, and alleging that they are desirous of qualifying as such, pray that an inventory of the succession property be taken, and the court orders that letters testamentary be delivered to them on their complying with the requisites of the law, and orders an inventory to be taken as prayed for, and one of them takes an oath well and faithfully to perform all the duties of executor, and the other does not, is the one who has not taken the oath presumed to have renounced the trust, and is the one who has, entitled to the entire commission.

We think yes.

The word "qualify," in its legal use, means to take an oath to discharge the duties of an office, and when an executor named in a will alleges that he desires to qualify as such, and the court orders that letters testamentary issue to him upon his complying with the requisites of the law, we understand that they are to be issued to him when he shall have taken the oath well and faithfully to discharge the duties of his trust. The presentation of his petition is the announcement that he is willing to accept the trust; the taking of the oath is the evidence that he has accepted it. It is then that letters issue to him; then that his responsibilities begin; then that his rights attach. And when, after alleging that he proposes to accept the trust, and the court orders him to be confirmed therein upon his complying with the requisites of the law, and he does not comply with them, the presumption is that

Josephine Hale, Executrix, v. Salter et als.

he has changed his mind. If there are two, and one qualifies, and the other does not, it must, we think, be assumed that the one who does not, at the last moment, is not willing to assume the responsibilities confided to him. These responsibilities then fall upon the co-executor. If the responsibilities are thrown upon him, the compensation goes with them; and the heirs can not deprive him of them by taking immediate possession of the estate. The right to the fees was earned when the responsibilities were assumed, and he can not be deprived of them by any action of the heirs.

Judgment affirmed.

Rehearing refused.

No. 2946.

A. LARTIGUE v. ELIZA WHITE, wife of C. Bullitt, et als.

See the syllabus in the case of A. Lartigue v. Clara White, wife of Carl Kohn, No. 2945. It is applicable to this one. The two cases must be taken together.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. E. Howard McCaleb*, for plaintiff and appellee. *Miles Taylor and William Grant*, for defendants and appellants.

ON MOTION TO DISMISS THE APPEAL.

HOWELL, J. For the reason given in the case of A. Lartigue v. Clara White et als., No. 2945,

It is ordered that the motion to dismiss be overruled.

WYLY, J., *dissenting*. I do not concur in the decision of the court on the question of jurisdiction presented in this case. I think the appeal should be dismissed for want of jurisdiction, the amount in dispute being less than \$500.

This suit was brought by a creditor of the succession of Maunsel White, against his four heirs, who have been put in possession, to recover from them their respective shares of a debt due by said succession, the amount so due and in controversy between the plaintiff and each of the defendants being under \$500, and the judgment rendered against each of them being under \$500.

Whether the heirs were sued by the plaintiff separately, as they might have been, (C. C. 1376; C. P. 120; 5 R. 224;) or were all joined in the same action, can make no difference.

The prayer of the petition determines the character of the action.

The plaintiff prays that each of the four heirs of Maunsel White, deceased, be duly cited to answer, "and after due proceedings had,

25	325
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they be each of them condemned to pay unto petitioner their respective shares of said sum of fifteen hundred dollars, proportionately to the amount received by them from the succession of Maunsel White, sr., with interest from judicial demand, etc."

Regarding the prayer of the petition, what does the character of the action appear to be?

Is it an action against the defendants as representatives of the succession of their father; or is it an action against each of the heirs personally, for his virile share of his ancestor's debt? If it be an action against them as representatives of the succession, of course the amount of the debt against the succession being \$1500, is sufficient to give this court jurisdiction.

But if it be a mere personal action against each of the heirs to recover from him his virile share of his ancestor's debt, the amount sought to be recovered from each being less than \$500, this court is without jurisdiction. I think this is a personal action against each of the heirs for the amount for which he has become liable by entering upon and distributing the estate of the deceased.

The obligation sought to be enforced against each of these defendants had its origin in a quasi contract. It sprung into existence the moment they did the act of taking possession and distributing among themselves the property of the succession. That moment the legal obligation arose between the plaintiff, a creditor of the succession, and each of the defendants, whereby they became bound to him as his debtors, and he acquired a personal action against them.

Until the heirs went into possession, the plaintiff, although holding an obligation against the succession, based on the contract between him and its executors, had no cause of action against them. If the succession had remained in the hands of its legal representatives and turned out insolvent, the plaintiff, although holding the obligation of the succession, would have had no legal obligation against these defendants—he would not have had a cause of action against them.

The object of this litigation is not to enforce an obligation of the succession, because the succession has not been sued. It is to enforce that obligation, springing from a quasi contract, which binds the defendants to the plaintiff as his debtors. And this illustrates that passage in article 1376, C. C., which says: "Thus the creditors of the succession must divide among the heirs the personal action which they have against them, and can not sue one for the portion of the other, or one for the whole debt." Then if the amount of the obligation sought to be enforced against each of these heirs be less than \$500, which it is, this court has no jurisdiction. The fact that the petition contains several distinct independent demands against the several heirs for the virile share due by each, and the aggregate amount thereof exceeds

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\$500, does not give this court appellate jurisdiction. Consent can not give jurisdiction, and the cumulation of several actions in one can not give jurisdiction where it would not be had without it. In *Duggan v. De Lizardi and others*, 5 R. 224, this court remarked: "There appears to us to be a difference between the obligation of heirs and of joint obligors by contract. The law portions among the heirs all the charges of the inheritance, and each heir may be sued, perhaps separately, for his virile share. Not so, the co-obligors by a joint contract. The Code requires that all should be sued together. In the one case it is a condition of his inheritance that each heir shall pay his share of the debts, and he may exonerate himself by renouncing the succession; in the other, no one of the joint obligors can release himself at will."

In *Merritt v. Hozey, sheriff, and others*, 4 R. 319, it was held that "no appeal will lie from an action instituted against several defendants on an instrument by which they are bound severally, as sureties, for a fixed sum, where the amount claimed from each is under \$300, though the whole claim exceed that sum. The defendants can not give jurisdiction by joining in one appeal, where they would have no right to be heard separately."

The case before us bears a striking analogy to the one to which I have just referred. There Hozey, the sheriff, and his sureties were sued for the aggregate amount of six hundred dollars, each one of the eight sureties binding himself in the bond for a share of the obligation of his principal; the amount assumed by each of the sureties being less than the amount required to give this court jurisdiction, it was held they could not by joining in one appeal give jurisdiction where they would have no right to be heard separately.

In that case the amount of the sheriff's bond was six hundred dollars, and as to him this court had jurisdiction, although as to his sureties it had not, because the sum claimed of each of them was less than three hundred dollars.

Here the sum due by the succession is \$1500, and if the suit before us was against the succession this court would have jurisdiction. But the suit is against each of four heirs for his virile share of that debt, and the amount claimed of each is a sum below the jurisdiction of this court.

I repeat that the obligation sought to be enforced in this suit, is the legal obligation that sprung from a quasi contract the moment the heirs accepted the succession and went into its possession. That fact alone caused each one of these defendants to become the personal debtor of the plaintiff, a creditor of the succession, for his virile share of the debt of the estate.

This is the doctrine explicitly laid down in article 1372 C. C., which says: "The heirs by the fact alone of the simple acceptance of a

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succession left them, contract the obligation to discharge all the debts of such succession, to whatever sum they may amount, though they far exceed the value of the effects composing it."

When I read the prayer of the petition by the light of this article and article 1376 C. C., I have no doubt as to the object of the action. It was to enforce that legal obligation incurred by the heirs alone by the fact of accepting the succession, against each of them for his virile share of the debt of the succession held by the plaintiff.

That virile share being less than \$500, and being the amount in controversy between the plaintiff and each of the defendants, this court is without jurisdiction and the appeal should be dismissed.

For the reasons given I deem it my duty to render a dissenting opinion in this case.

ON THE MERITS.

WYLY, J. The defendants, the heirs of Maunsel White, appeal from the judgment for fifteen hundred dollars against them for professional services rendered by the plaintiff, an attorney-at-law.

In 1864 the executors of White caused his will to be probated, and the plaintiff, then clerk of the court, drew the petition for them. For this service he was paid fifty dollars.

On the nineteenth of May, 1868, the plaintiff was admitted to the bar.

On the second of February, 1869, the executors wrote to the plaintiff that the heirs were about selling the property of the estate, and in order to do so they requested him to get the order putting them in possession of the property. He obtained, without opposition and by consent, this and two other orders—one discharging the executors and the other requiring the erasure of certain mortgages.

He was not the regular attorney for the executors and the heirs; but was only employed to do this particular service, which was not difficult nor such as involved any great responsibility.

We fix the value of the services at one hundred and fifty dollars.

It is therefore ordered that the judgment herein be amended by reducing the total amount thereof to one hundred and fifty dollars, and as thus amended let it be affirmed, appellee paying costs of appeal.

Rehearing refused.

State ex rel. Leonard v. The Parish Judge of the parish of Plaquemines.

No. 4649.

STATE ex rel. P. LEONARD, Public Administrator, v. THE PARISH
JUDGE OF THE PARISH OF PLAQUEMINES.

Where on the application of the public administrator of a parish, praying to be appointed administrator of a vacant estate, and to be authorized as such to institute all the proceedings required by law, the parish judge refused to take any judicial action in relation to the same, because a person representing himself to be the brother and the heir of the deceased had appeared, praying to be appointed administrator of said estate, and because such being the case, it was believed by the court that the public administrator had no right to have his prayer complied with ;

Held—That the judge *a quo* erred. The application of the public administrator should have been filed, and, after due notice given, tried contradictorily with the application of any other party, and the rights of all the parties settled by a judicial decree.

APPPLICATION for a rule *nisi* against Judge Prescott, parish court of Plaquemines. *E. Howard McCaleb*, for relator. Judge *Prescott in propria persona*.

TALIAFERRO, J. The relator complains that in his capacity of public administrator of the parish of Plaquemines, he presented to the defendant, who is parish judge of that parish, a petition, in which he set forth that one Andrew Robertson died recently in said parish intestate, leaving therein a succession without heirs present or represented, and prayed to be appointed administrator of the vacant estate of the decedent; that an inventory and appraisement of the property be made, and that an attorney be appointed to represent the absent heirs. Relator alleges that the said judge refused to make any order on the petition so presented to him, and declined taking any judicial action in relation to the same, therein acting in dereliction of his duties as a public officer and in violation of law. The relator applied to this court for a mandamus, directing the said judge to discharge his duties in the premises, as by law it is incumbent upon him to do. A rule *nisi* was granted, as prayed for, and the defendant, William Prescott, parish judge of the parish of Plaquemines, was ordered to show cause, on Saturday, the twenty-ninth of March, 1873, why the mandamus should not be made peremptory, requiring him, in the name of the State of Louisiana, to render a judgment or order upon the petition presented to him by the relator, invoking judicial action in the matter of the vacant succession of Andrew Robertson, deceased, according to law.

The judge answered, that on the twentieth of March, 1873, a brother of the deceased appeared and filed a petition, praying an order for the production of a certain box, deposited by the decedent in the Hibernia Bank, in New Orleans, in which box the petitioner was induced to think the decedent's will might be found. This proceeding, followed up on the twenty second of March, two days after, by a petition of the same person, representing himself to be an heir of

State ex rel. Leonard v. The Parish Judge of the parish of Plaquemines.

Andrew Robertson, deceased, and praying to be appointed administrator of his estate, the respondent thought that the petitioner, Stewart Robertson, had made himself known as an heir, and opened the succession of Andrew Robertson, and, therefore, not believing, under that state of facts, that the public administrator had by law a right to the administration of the estate, he declined to render any order prayed for by the public administrator.

We think the respondent erred. The application of the public administrator to be appointed administrator should have been filed, and after due notice given, tried contradictorily with the application of any other party, and the rights of all the parties settled by a judicial decree.

It is, therefore, ordered that the rule be made absolute, and that William M. Prescott, parish judge of the parish of Plaquemines, in his official capacity, do proceed to the performance of his duties herein, in conformity with law and this opinion; defendant paying costs of these proceedings.

No. 2899.

LOUIS LALAUrie v. THE SOUTHERN BANK.

Where a note was protested through error on one day, and was paid early on the next day, and, although there was carelessness on the part of the bank, no actual injury or damage was proved to have been caused thereby to the plaintiff, who was the drawer of the note; Held—That the verdict and judgment for five hundred dollars in the court *a qua* in favor of plaintiff was clearly erroneous.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J.* Jury case. *E. Meunier, Chervet & Duplantier*, for plaintiff. *Roselius & Philips*, for defendant.

LUDELING, C. J. A note for sixty dollars, made by the plaintiff, was deposited in the Southern Bank for collection, by Albert Lamotte. It was protested for non-payment through a mistake on the part of the bank.

The plaintiff brought this suit to recover damages caused him by the protest of his note.

There was a verdict of the jury for five hundred dollars in favor of the plaintiff, and a judgment in accordance therewith. The defendant appealed.

The evidence shows that the employes of the bank were not able to decipher the signature of the maker, and that they guessed at it, entering the name in the bank book, kept for the purpose, as J. Labalos. That when the clerk of the maker came to pay the note, he was informed by the cashier that no such note was deposited with the

Lalaurie v. The Southern Bank.

bank; and a few days afterwards the note was given to a notary, who protested it. This clearly shows carelessness on the part of the bank.

But no actual injury or damage to the plaintiff has been proved. The note was protested through error on one day, and was paid early on the next day. The verdict and judgment are clearly erroneous.

It is therefore ordered and adjudged that the verdict of the jury be set aside, that the judgment of the lower court be reversed, and that there be judgment in favor of the defendant rejecting the plaintiff's demand with costs in both courts.

No. 4349.

SUCCESSION OF EDMUND HOGAN.

Where there was no necessity for a citation, but where the plaintiff and opponent had been formally summoned by the defendant, to oppose his account as executor of a succession, if he thought proper, and to present his opposition within ten days;

Held—That said defendant could not invoke judicial action in the matter to the prejudice of plaintiff and opponent before the specified day had expired. Hence, the order of homologation having been rendered after three days delay only, was null, and no action of nullity is necessary to set it aside.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud*, J. *F. Gilmore*, for appellant. *M. A. Dooley*, for appellee.

TALIAFERRO, J. This is an appeal by the executor from two orders of the Second District Court, rendered during the proceedings in that court relating to the succession. One of these orders was on a rule taken by the opponent to the executor's account to have stricken out from the statement of his account various impertinent and irrelevant matters, consisting of a prolix narrative of the life and times of Edmund Hogan, interspersed with occasional episodes of objurgation toward the opponent and others, whom he suspects of feeling an interest in having him called to account for his administration of the succession.

The other order was rendered on a rule to show cause why a previous order of the court homologating the executor's account should not be rescinded, as having been prematurely and imprudently made.

In regard to the order first named, it directed the offensive and irrelevant matter to be stricken out; and by the second, the order homologating the account was annulled and set aside. From these orders or judgments of the court *a qua* the executor has appealed.

We think the ruling of the court correct in both cases. It is derogatory to legal proceedings to be incumbered with a useless mass of matter like that presented by the executor in this instance. Shrunk

to its essence, his "statement and account" is that he received \$650 in money at Washington city belonging to Hogan's succession, and that this is all that he ever saw or heard of that belonged to it; that he spent \$200 in going for and getting the \$650 at Washington. He charges the estate three dollars per day for three hundred and twenty days spent by him in a vain and profitless search made in Louisiana, Texas and Mexico for property of Hogan's estate. This, with other charges, amounts to \$1996. Giving credit for \$650, he strikes a balance in his own favor of \$1346. These figures occupy part of the last page of his account. The preceding eighteen pages were properly ordered by the court to be stricken out. They are mainly directed to showing why Hogan never had any property, and in detailing his various labors in pursuit of property said to have been left by him at his decease. The language he uses in reference to the opponent is reprehensible, and not permissible in proceedings in a court of justice. Equally unbecoming and out of place are his insinuations against a respectable and prominent member of a religious denomination, that he is conniving with the opponent to get money from the executor for the benefit of the religious order to which he belongs.

As to the order rescinding a previous one homologating the executor's account, the facts seem to be that the account was filed on the twenty-seventh of February, 1872. On the fifth of March following a citation was served upon the agent and attorney in fact of the heir to show cause within ten days from notification thereof why the executor's account should not be approved and homologated. On the ninth of March, on the motion of the executor's counsel, the account was homologated, the order of homologation reciting that due notice had been given, and that more than three days had elapsed and no opposition had been filed, etc. On the fourteenth of March, before the expiration of ten days from the day on which the notice was served upon the agent representing the heir, an opposition was filed by the agent. The defendant contends that the case is governed by the article 1004 of the Code of Practice, which requires the heirs to file their objections to the executor's account, if they have any, within three days from the rendering of the account; that there is no law that requires notice of the filing of the account; that the mistake of the clerk in issuing a notice under articles 1064 and 1065 of the revised Civil Code can not prejudice the rights of the defendant.

There was no necessity for a citation; but the plaintiff and opponent having been formally summoned by the defendant to oppose the account if he thought proper, and to present this opposition within ten days, the defendant could not invoke judicial action in the matter to the prejudice of the opponent before the specified delay expired. Then the order of homologation having been rendered after three

 Succession of Hogan.

days' delay only was null, and no action of nullity was necessary to set it aside. 2 An. 493; 20 An. 75; *ib.* 68; 23 An. 298.

It is therefore ordered that the judgments appealed from be affirmed, the defendant and appellant paying costs of this appeal. It is further ordered that the case be remanded to the court of the first instance for further proceedings according to law.

 No. 4460.

 M. A. SOUTHWORTH *v.* CITY OF NEW ORLEANS.

Where, instead of procuring and recording *according to law*, certified copies of judgments as directed by city ordinance No. 1630, administration series, the plaintiff followed the provisions in section 12 of act No. 73 of 1872, by which a special mode was provided for recording the taxes due to the city without any cost to the city;

Held—That if the provisions of this act are resorted to in preparing and inscribing the tax judgments to preserve the lien and mortgage in favor of the city, its provisions in regard to compensation must be enforced. It is only by the terms of this law that the lists or registers prepared by the plaintiff can have effect as a legal inscription. But this inscription was to be made without cost to the city. Outside of this law the said registers or inscriptions of judgments, as made by plaintiff, are without effect. The inscriptions are not made in the books of privileges and mortgages required by the general law on the subject.

A PPEAL from the Seventh District Court, parish of Orleans. *Collens, J. Hornor & Benedict*, for plaintiff and appellee. *Georgie S. Lacey*, City Attorney, and *A. O. Lewis*, for appellant.

HOWELL, J. The plaintiff, as recorder of mortgages, claims \$10,361 for recording 14,802 judgments, by virtue of a special agreement made in pursuance of ordinance No. 1630, Administration Series. The city denies the alleged contract; avers that the said ordinance was passed in violation of a prohibitory law (sections 11 and 12 of Act No. 73 of 1872), and is null; that by section 12 of said act the recorder is prohibited from charging or collecting any fee for recording the city tax judgments, he being entitled to charge only for cancelling the same, and that if the ordinance is valid, the judgments in question have not been recorded according to law as is required in said ordinance, and plaintiff has not complied with his agreement. From a judgment in favor of the plaintiff for \$10,000 the city has appealed.

Ordinance No. 1630 is in these words: "That the recorder of mortgages of the parish of Orleans is hereby authorized and directed to obtain, at his own expense, from the clerks of the district courts, certified copies of all unrecorded and unprescribed tax judgments in favor of the city of New Orleans against real estate, and similar judgments of the amount of ten dollars and upwards against personal property, and to record the same in the mortgage office according to law; provided that the whole costs of said certificates or copies of judgments and the recording thereof shall not exceed seventy-five cents

for each judgment; provided the amount contracted for and appropriated hereby shall not exceed \$10,000."

Instead of procuring and recording, according to law, certified copies of judgments, as directed in the foregoing ordinance, the plaintiff pursued the mode and followed the provisions in section 12 of act No. 73 above referred to. By said section a special mode was provided for recording the taxes due the city, but the work was to be performed by the city officials and employes without any cost to the city. Registers with necessary particulars and dates and indexes were to be prepared and bound in volumes, and one of them deposited in the recorder's office and thus become a legal record or book for the inscription of the lien and mortgage in favor of the city in said office; "and no fee shall be allowed to the recorder of mortgages for such inscription; but he shall be allowed one dollar each for canceling the same, which he may do upon the certificate of the Administrator of Public Accounts of the payment or settlement thereof."

If the provisions of this law are resorted to in preparing and inscribing the tax judgments to preserve the lien and mortgage in favor of the city, its provisions in regard to compensation must be enforced. It is only by the terms of this law that the lists or registers prepared by the plaintiff can have effect as a legal inscription. But this inscription was to be made without cost to the city. Outside of this law the said registers or inscription of judgments, as made by the plaintiff, is without effect. The inscriptions are not made in the books of privileges and mortgages required by the general law on the subject

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

No. 2851.

SUCCESSION OF WIDOW DE GREHAN.

Where the heirs of the deceased had accepted the succession unconditionally and the evidence showed that they were in possession of the property of the succession;

Held—That the suit was improperly brought against them in the probate court; it should have been instituted in the district court, the exception to the jurisdiction is well founded.

APPEAL from the Second District Court, parish of Orleans. *Durigneaud, J. M. Blache, Labatt & Aroni*, for appellee. *D. Augustin*, for appellant.

LUDELING, C. J. In the case of the succession of the widow De Gréhan, reported in the 21 An., we held that the heirs of the deceased had, in that proceeding, accepted the succession unconditionally, and

Succession of Widow de Grehan.

the evidence showed that they were in possession of the property of the succession.

This suit was therefore improperly instituted against them in the Probate Court—it should have been instituted in the District Court. The exception to the jurisdiction should have been maintained.

It is therefore ordered and adjudged that the judgment of the court *a qua* be set aside, and that there be judgment dismissing the plaintiff's suit with costs.

Rehearing refused.

No. 4437.

CITY OF BALTIMORE v. HENRY PARLANGE.

Where the incompleteness of the record is due to a fault attributable to the clerk and not to the appellant, the appeal will not be dismissed on that ground.

It is useless to issue a *certiorari*, where the appellant has filed a certified copy of the missing document, so that the case can be examined.

In executing the process of court the sheriff had no right to incur costs for advertising in other papers than the official journal.

To complete the seizure in this case, the sheriff of the parish of Orleans was not bound to take corporeal possession of the property and appoint a keeper. The seizure was completed by registering the notice.

The charge for appraisers' fee was properly rejected, because prohibited by article 671, C. P.

The item of costs for plan and survey was also unauthorized.

The charges for city and State taxes on the property were correctly made. It was the duty of the sheriff to pay them out of the proceeds of the property sold.

Where it was conceded that there was due to a builder, on his duly registered contract, a certain balance, after deducting partial payments previously made;

Held—That for this amount of his judgment, the builder's privilege had effect as against the plaintiff and other mortgage creditors of the defendant in execution.

The attorney's fees and damages stipulated in the contract with the builder create no privilege.

Where there was a clause in the contract allowing the builder further compensation for extra work done under any alteration of the specifications that might be ordered, and there was no fixed sum or estimate for such extra work;

Held—That the registry of the contract gave effect to no privilege to secure this indefinite amount.

Where the plaintiff in execution contended that the builder's privilege was lost by the sale of the property in mass;

Held—That said plaintiff, who proceeded with the sale in block, notwithstanding the third opponent's application for a separate appraisal, ought not to be heard setting up such a defense. He ought not to benefit by his own wrong.

The third opponent, having claimed part of the proceeds, has no right to demand that the sale be treated as an absolute nullity. Besides, it could only be set aside in a direct action.

The second mortgage creditor has no act on against the prior mortgage creditor for the balance remaining in the sheriff's hands or the hands of the purchaser, and the plaintiff, who gets his judgment paid has no right to object to the payment of the second mortgage.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. E. Bermudez*, for Charles Turpin, intervenor and appellee. *Roselius & Philips*, for sheriff, appellant. *Hornor & Benedict* and *E. O. Kelly*, for George Mertz, intervenor and appellant. *Semmes & Mott*, for plaintiff and appellant.

WYLY, J. The motion to dismiss this appeal on the ground that

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111	949

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the record is incomplete, is denied; because the fault was attributable to the clerk, and not to the appellants. It is useless to issue a *certiorari*, because the appellants have filed a certified copy of the missing document; so the case can now be examined. This is a controversy between the mortgage and privilege creditors of the defendant, for the proceeds of the sale of the "Orleans Ball Room" and other property, situated on Orleans and St. Ann streets, belonging to the defendant.

While the property was under seizure under the foreclosure of plaintiff's special mortgage and vendor's privilege, Samuel Johnson, a builder, filed a third opposition, setting up his lien for the sum due him for rebuilding the house, which had been burned. The claim was subsequently transferred to George Mertz, who took a rule to compel the sheriff to cause the buildings and lots seized to be appraised separately, "and to retain in his hands the amount of the sale of said buildings until the final decision of the intervention."

The court refused to make the rule absolute, and on appeal, this court, in May, 1871, reversed the decision, and ordered the separate appraisement to be made. Pending that appeal, however, to wit, on seventh February, 1870, the property was sold in block for \$22,005, to John H. O'Connor, and the funds have not yet been distributed.

In answer to the third opposition, the plaintiff denied generally the allegations thereof, and specially that said Mertz, or Johnson, his assignor, had or has any privilege on the property under seizure, and avers that if any privilege ever existed in favor of said Johnson or Mertz, it was only for the amount of the recorded contract, which has been extinguished by payments made from time to time by the obligee in said contract, or by some one in his behalf; and that said intervenor or third opponent has no privilege upon said property or the proceeds thereof, as against the plaintiff.

Charles Turpin, a judicial mortgage creditor, claiming to be next in rank to the plaintiff, the city of Baltimore, took a rule to compel the sheriff to apply the proceeds of the sale, exceeding the amount of plaintiff's judgment, to the payment of his claim.

He alleges, that after the payment of plaintiff, the seizing creditor, there will remain at least \$6000, to be applied to his judgment. He alleges that the sale was made by Maxwell, sheriff, and among the charges made against the proceeds, figure a number of items not due, to wit: State and city taxes, appraiser's fees, unauthorized advertisements, and other charges, specified in the rules, aggregating about \$5000.

The court rejected the claim of the third opponent, Mertz; disallowed the charges opposed in the sheriff's account, reducing it to \$1424 90; and ordered the funds to be distributed as follows:

First—To the payment in full of plaintiff's judgment, amounting to \$15,640 98.

Second—The balance to be applied to Turpin's judgment.

The court fixed this balance at \$4940 02, and gave judgment therefor against Maxwell, sheriff, and also against the plaintiff, the city of Baltimore.

From this judgment, Maxwell, the city of Baltimore and Mertz have appealed.

We think the court did not err in rejecting some of the charges set up by the sheriff. The cost for advertising in papers other than the official journal was an expense that the sheriff had no right to incur in executing the process of the court. The item of \$608 for keeper's fee was properly disallowed; to complete the seizure the sheriff of the parish of Orleans was not bound to take corporeal possession of the property and appoint a keeper; the seizure was completed by registering the notice. Revised Statutes of 1870, sections 3625, 3626, 362. The charge for appraiser's fee was properly rejected, because it is prohibited by article 671 C. P. The item of seventy-five dollars for plan and survey was also unauthorized. The charges, however, for city and State taxes on the property, the court erred in rejecting. It was the duty of the sheriff to pay them out of the proceeds of the property sold. Revised Statutes of 1870, section 3620. The amount of these taxes should be added to the total amount of the charges allowed by the judge *a quo*, to wit: \$1424 90. We think the court erred in refusing to allow the third opponent Mertz a privilege for any part of his claim.

It is conceded that there is due to the builder on the contract registered, after deducting all payments, \$1573 80. For this amount of his judgment the builder's privilege has effect as against the plaintiff and Turpin, mortgage creditors of the defendant in execution. The attorney's fees and damages stipulated in the contract with the builder create no privilege. The consideration in the builder's contract was fixed at \$16,250, which has all been paid as aforesaid except \$1573 80. There was a clause in the contract allowing further compensation for extra work done under any alteration of the specifications that might be ordered; but there was no fixed sum or estimate for such extra work. Consequently the registry of the contract gave effect to no privilege to secure this indefinite amount.

But the plaintiff contends that the builder's privilege, amounting to \$1573 80, as aforesaid, was lost by the sale of the property in mass. The plaintiff, who proceeded with the sale in block, notwithstanding the third opponent's application for a separate appraisement, ought not to be heard setting up such a defense. The opponent did all that he could to prevent it. When his rule was denied by the lower court.

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he took a suspensive appeal, and this court reversed the decree and made the rule absolute requiring a separate appraisal.

The plaintiff ought not to benefit by his own wrong. We think, therefore, that the judgment rejecting Mertz's claim is erroneous, and that he should have judgment for \$1573 80, to be paid out of the proceeds of the sale. Having claimed part of the proceeds, Mertz has no right to demand that the sale be treated as an absolute nullity; besides, it could only be set aside in a direct action.

We think the court did not err in requiring the whole of plaintiff's claim to be paid, as there are ample funds after paying the privilege in favor of Mertz. But we think the court erred in entering judgment in favor of Charles Turpin against the plaintiff, the city of Baltimore. The second mortgage creditor has no action against the prior mortgage creditor for the balance remaining in the sheriff's hands or the hands of the purchaser. We think Charles Turpin, the second mortgage creditor, is entitled to the balance, if any, after paying the sheriff's charges, and after paying Mertz's privilege of \$1573 80 and plaintiff's judgment of \$15,640 98; and that the plaintiff, who gets his judgment paid, has no right to object to the judgment of Turpin, who holds the second mortgage.

It is therefore ordered that the judgment, so far as it fixes the sheriff's charges at \$1424 90, be amended by adding thereto the total amount of taxes charged in his account, and in all other respects that said judgment be annulled; and it is now ordered that out of the proceeds the third opponent be paid the amount of his privilege claim, to wit: \$1573 80; that plaintiff be paid in full, to wit: \$15,640 98, and that the balance, if any, be applied to the judgment of Charles Turpin. It is further ordered that Charles Turpin pay costs of this appeal.

Rehearing refused.

No. 4611.

A. and L. CHEVAL v. ST. LEON DESTÉZ and ETIENNE CARLON.

Where the plaintiffs, appealing from the judgment of the court below, have assigned as error on the face of the record that the motion to dissolve an injunction having been overruled, an exception based on the *same grounds* could not have been acted upon by the judge *a quo* a second time;

Held—That this court regards the document, called an exception, an answer, and that there existed no reason why the judge *a quo* could not pass upon the merits of the case, which he seems to have done, although he also calls the answer an exception.

APPEAL from the Fifth District Court, parish of Orleans. *Cullom, J. Charles Louque*, for plaintiffs and appellants. *T. A. Bartlette*, for defendants and appellees.

LUDELING, C. J. This is an injunction suit. It is alleged in the petition that the defendant brought suit against the plaintiffs, and that

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while the suit was pending, the plaintiffs, A. and L. Cheval, caused the rights and interest of Destez and Carlon in said suit to be seized under a judgment in their favor, and that they, A. and L. Cheval bought said rights; that subsequently a judgment was rendered and signed in the case of Destez and Carlon v. Cheval, notwithstanding the aforesaid sale, whereby said claims of Destez and Carlon had been extinguished by confusion; that having had said judgment signed, they sued petitioner's surety on the bond to release the property attached, obtained a judgment against her and caused her property to be seized and advertised for sale.

Under these circumstances A. and L. Cheval obtained an injunction to prevent the sale of the property of their said surety.

A motion to dissolve the injunction was filed, based on the grounds following: that the affidavit was not sufficient; that the surety on the bond was not such as the law required; that nothing in the affidavit justified the injunction, inasmuch as all the causes set forth on which it is based, existed before the judgment, have already been urged before the court and decided against the plaintiffs herein, and have acquired the force of *res judicata*, etc.

This rule, or motion to dissolve, was refused. The defendants then filed what they called an exception, but which, we think, is also an answer. It avers that all the matters set up in the petition existed and were known to plaintiffs before the judgment sought to be annulled was rendered and can not now be set up in defense; that said matters are insufficient to maintain an injunction against the execution herein issued, and they pray that the suit and injunction be dismissed with ten per cent. per annum interest, twenty per cent. general damages, and one hundred dollars special damages and for costs and general relief.

The judgment of the court is in the following words:

"In the matter of the exception herein, for the reasons orally assigned by the court, it is ordered, adjudged and decreed that said exception be partially maintained; that the injunction herein be dissolved with ten per cent. per annum interest on amount of judgment enjoined, etc. It is further ordered that plaintiffs pay all costs of suit."

From this judgment an appeal has been taken by the plaintiffs, who have assigned as error on the face of the record that the motion to dissolve having been overruled, the exception based on the same grounds could not have been acted upon by the judge *a quo* a second time.

We regard the document called an exception an answer—and there existed no reason why the judge *a quo* could not pass upon the merits of the case, which he seems to have done, although he also calls the answer an exception.

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There is no note of evidence in the record and no evidence. It is impossible therefore for us to revise the judgment. We have not been able to discover any error on the face of the papers.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

Rehearing refused.

No. 4513.

STATE ex rel. J. T. MICHEL v. BENJAMIN CAMPBELL.

Where, on the fourth of April, 1870, Campbell was elected by the Council of the city of New Orleans, recorder of the Sixth District, the term of his appointment being for two years, and expiring, therefore, on the fourth of April, 1872, and where Michel was appointed in his place, by the Governor, on the twentieth of September, 1872, and on the twenty-fourth of September, 1872, the Council again elected Campbell;

Held—That, in a legal sense, the office was vacant on the fourth of April, 1872, and Campbell was only a tenant thereof at the will of the appointing power, and that, under the circumstances of the case, the appointing power was vested in the Governor, by the 1577th section of the R. S., and not in the Council of the city of New Orleans. The appointment being made by the Governor, there was no vacancy, and the subsequent election by the Council of another person, was the filling of a place which was not empty.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Charles S. Rice and William R. Whitaker*, for plaintiff and appellant. *Fellows & Mills*, for defendant and appellant.

MORGAN, J. On the fourth April, 1870, Campbell was elected by the Council of the city of New Orleans recorder of the Sixth District. The term of his appointment was for two years. It expired, therefore, on the fourth April, 1872.

Michel was appointed to fill the vacancy by the Governor on the twentieth September, 1872. On the twenty-fourth September, 1872, the Council again elected Campbell.

Michel now claims his office under the commission of the Governor, issued four days before the second election of Campbell.

Campbell contends that he is entitled to the office by reason of his election by the Council.

Under this state of facts the question is who is entitled to the office?

It is clear that Campbell's term of office expired on the fourth April, 1872. He held over, it is true, but this he did under the general provisions of the law which retain all officers in their positions until their successors have been appointed and qualified. In a legal sense the office was vacant, and Campbell was only a tenant thereof at the will of the appointing power. Under the law where did this appointing power lie—the Council having permitted the vacancy to occur? We think the answer is to be found in the 1577th section of the Revised Statutes which provides that, "Whenever a vacancy occurs in any office, State, parish, or municipal, in this State, now existing, or which

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may hereafter be created, from death, resignation, or from any other cause whatever, the mode of filling which is not provided for in the constitution, all such vacancies shall be filled, if they be State or parish offices, by appointment by the Governor, with the advice and consent of the Senate, which appointment shall be for the entire unexpired term of such vacant office. If the Senate be not in session at the time the appointment is made, the vacancy shall be filled by appointment by the Governor, which appointment shall expire on the third Monday after the meeting of the next session of the General Assembly thereafter, unless the time for which the vacancy exists expires sooner; and if the time of such vacancy has not expired, it shall then be the duty of the Governor to fill such unexpired vacancy by appointment, by and with the advice and consent of the Senate; and if it be a municipal office, the vacancy must be filled by appointment by the Governor for the unexpired term of the person whose office is so vacated."

The office of recorder of the Sixth District of this city is not a constitutional office, nor is the mode of filling a vacancy occurring therein provided for in that instrument. It is the creation of the Legislature, and the appointments thereto are regulated by the Legislature; and the Legislature having provided that any vacancy occurring in a State, parish, or municipal office, not provided for by the constitution, shall be filled by the Governor; and the office in question being vacant, from the fact that the term of office of the incumbent had expired, it follows that the Governor had the right to make the appointment. The appointment made, there was no vacancy, and the subsequent election by the Council, of another person, was the filling of a place which was already occupied.

These being our views, it follows that Michel, the relator, is entitled to the office which he claims, and that the judgment giving it to Campbell is erroneous.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be avoided, annulled and reversed, and that there be judgment in favor of the relator, declaring him to be entitled to the office of recorder of the Sixth District of the city of New Orleans, and that he be placed in possession thereof; appellee to pay the costs in both courts.

HOWELL, J., *dissenting*. I can not concur in the opinion that there was such a vacancy in the office, as is contemplated in the general law embraced in section 2606 R. S.

A careful reading of that law will, I think, lead to the construction, as the only correct one, that the vacancy contemplated is one that occurs by some act or event during a current term and not by the

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expiration of a preceding term, as held by the majority of the court. The expression or phrase, "for the entire unexpired term of such vacant office," implies that the office had been properly filled for a part of the term, and by some event had become vacant, making it necessary for some one to be immediately placed in the office, so that the public interests should not suffer.

In this case no such vacancy had occurred. Under the city charter the defendant was elected Recorder by the City Council for two years from the fourth of April, 1870, and by the same law, as well the State constitution, he was authorized and required to continue to fill the said office until his successor was duly elected and qualified, and that election was, by the law creating the office, committed to the City Council. See act No. 7, extra session of 1870, section 31 and last clause of section 7.

It was by this law made the duty of the Council, not on a particular day, but as soon as practicable, to elect the recorder, who was to hold office for two years, and at the expiration thereof to continue in the discharge of his duties, which the defendant was doing; and he was rightfully doing so by a legal tenure, and hence there was no vacancy to authorize the executive action. The City Council has the right, and it was its duty at the beginning of this second term, to elect a recorder for another two years, but its failure to do so on or before the first day of said second term did not produce a vacancy, for the city charter, creating the office, provided for the contingency. If the doctrine of the majority opinion is correct, the Governor had the right, I think, on the first day of the second term to make the appointment, provided only his action preceded, by a moment of time, the action which the Council might take on the same day. The law never contemplated any such race or test of speed in filling offices. In my opinion, the Governor had no authority under the circumstances to appoint the relator.

Rehearing refused.

No. 4605.

STATE OF LOUISIANA ex rel. THOMAS LYNNE v. CHARLES CLINTON,
State Auditor.

The clerks of courts in the city of New Orleans do not come within the provisions of section 52 of act No. 42 of the General Assembly of 1871 in relation to the assessment and collection of taxes.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. W. W. Howe, C. S. Rice, Whitaker, Kennard and Prentiss*, for relator and appellant. *A. P. Field*, Attorney General, and *E. C. Billings*, for respondent and appellee.

LUDELING, C. J. This is a proceeding by mandamus to compel the

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Auditor to warrant in relator's favor for fourteen thousand eight hundred and sixteen dollars and forty cents, alleged to be due to him for clerk's costs in a number of tax suits.

The answer of the Auditor is that he knows nothing of the facts relating to relator's claim, and that the General Assembly has not made any appropriation for the payment of such claims.

The relator relies upon the 52d section of act No. 42 of the General Assembly of 1871, in support of his demand. The section is as follows: "Section 52—That the assessors and tax collectors in the city of New Orleans, and the tax collectors of the other parishes of the State, and all others herein named in connection with the assessment and collection of taxes, shall be paid by the State Treasurer on the warrant of the Auditor of Public Accounts, out of any money in the treasury not otherwise appropriated."

It is contended that, because it is sometimes necessary to file suits in the courts to enforce the payment of taxes, therefore, the officers of the courts are embraced in the words of the law, "and all others herein named in connection with the assessment and collection of taxes."

We do not think so. The clerks of courts in the city of New Orleans are not named in the law, in connection with the assessment and collection of taxes. In the country they are required by said act to aid in making the assessments, and their compensation is specifically fixed.

It is unnecessary, in this case, to decide the other questions discussed by counsel.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

No. 1848.

JOHN HENDERSON v. MERCHANTS' MUTUAL INSURANCE COMPANY et als.

A contract made prior to the adoption of the constitution of Louisiana, 1868, can not be affected by the provision contained in section 127 of that constitution. If the contract was valid then, it is clear that this provision not only impairs but absolutely destroys its obligation within the meaning of the tenth section of the first article of the constitution of the United States.

Any judgment of a State court resting on such enactment of a State constitution, after the date of the contract, must be reversed in the Supreme Court of the United States.

The reinscription of a mortgage on the granting of an extension of time for the payment of a note, without any consideration for such extension, or change in any other term or condition of the contract, can not be held to be an agreement requiring a stamp.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. P. Charles Cuvelier*, for plaintiff and appellant. *A. & M. Voorhies*, for Merchants' Mutual Insurance Company, defendants and appellants. *E. Howard McCaleb*, for John T. Delmas, appellant.

HOWELL, J. On the first day of July, 1867, the plaintiff, John

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Henderson, bought at sheriff's sale, under executory process sued out by Gibert against J. Menard, a lot and improvements in New Orleans, for \$5625, and after paying the claim of the seizing creditor, costs, and certain privileges, retained in his hands the sum of \$3499 07, to be applied to the payment of the subsequent mortgages set forth in the certificate of the recorder of mortgages, read by the sheriff at the time of the sale. According to said certificate, there was a special mortgage in favor of the Merchants' Mutual Insurance Company, for \$10,000, granted by the debtor, Joseph Menard, on the twenty-ninth May, 1857, and reinscribed on the twenty-fifth June, 1867, and several judicial mortgages, resulting from judgments recorded prior to the reinscription of the above special mortgage.

Subsequent to the said purchase, the Merchants' Insurance Company obtained an order of seizure and sale against said property, for \$5000 interest and attorneys' fees, and asked that demand of payment and notice of seizure be served on Joseph Menard and John Henderson, alleging the latter to be the holder and possessor of the property, who refuses to pay, and that demand had been made of Menard more than thirty days prior thereto; whereupon Henderson instituted this proceeding by injunction, to restrain the sale of the property, on the following grounds:

First—The note on which the said claim is based is prescribed by five years.

Second—The mortgage securing said note is prescribed by ten years, and the reinscription after the lapse of more than ten years could not impair the precedence of other mortgages.

Third—The property having been sold under an anterior mortgage, could not be again seized and sold for an amount more than the balance of the purchase price in the hands of the purchaser.

Fourth—The order of seizure and sale issued upon insufficient evidence, in that there is no authentic evidence of the renewal or extension of the note; there is no stamp on said note; there is no allegation nor legal proof that the mortgage was inscribed in due time, the evidence of which must be stamped; there is no declaration in the affidavit or petition that the debt is due the plaintiff in the hypothecary action, and there is no allegation that ten days' notice had been given to the third possessor. All the parties in interest are called into court to discuss their rights to the said balance of the price and a prayer that all mortgages be canceled.

Issue was joined as to the several parties, but it is necessary to examine the defense set up by only two, J. T. Delmas, a judicial mortgagee, and the Merchants' Insurance Company.

Delmas answers that, having a judgment in the Second District Court of New Orleans, amounting to \$5486 73 against Joseph Menard

and the firm of Menard & Vignaud, he issued a garnishment process and seized in the hands of Henderson the sum of \$3499 07, the balance of the price of the property of Menard bought by Henderson and which belonged and accrued to said Menard; that to the interrogatories propounded, Henderson admitted owing said sum, but failing to pay, proceedings have been taken to compel him to do so; that respondent's judicial mortgage takes precedence of the pretended mortgage of the Merchants' Insurance Company, which and the claim are prescribed by ten and five years, and Menard could not waive or renounce to the prejudice of respondent's rights; he specially denies that Menard has any other property out of which his judgment can be satisfied, and avers that by his seizure he has acquired a privilege on the funds in the purchaser's hands; and he prays that the injunction be maintained against the insurance company and that Henderson be ordered to pay his whole claim.

The Merchants' Insurance Company, besides the general issue, denies the validity and finality of the judgment set up by Delmas, for the reason that the consideration of the claim on which it is based was Confederate money; propounds interrogatories to him to prove the fact, and prays that his said judgment be declared null.

There was judgment dismissing the demands of all the parties, at their respective costs; and Henderson and Delmas have appealed.

We will dispose, first, of the demand of Delmas, the judicial mortgagee:

Admitting the correctness of the legal positions assumed by him, he is successfully met by the plea to the validity of his judgment, which is not yet executed. His answers to the interrogatories leave no doubt that the said judgment was based on a contract or agreement, the consideration of which was Confederate money, and is, therefore, null. To render the decree asked for by him, would be to enforce a prohibited agreement. Article 127, Constitution. The District Court did not, therefore, err in dismissing his demand.

As to the questions between the plaintiff and the Merchants' Insurance Company, it need only be remarked, that the latter, holding the special mortgage next in rank to the one under which the property was sold, has the right, under the law and the facts of this case, to the balance of the price and interest retained by the purchaser, who is personally liable for its payment, and ten days' notice is, consequently, not required. C. P. 707, *et seq.*; 16 La. 163. The injunction should be perpetuated, however, as to the excess.

We deem the objection as to stamps of no weight. The note having been made prior to the date of the Stamp Act, was exempt, and the extensions of payment are not such agreements as require stamps under said act. There is no evidence as to the stamp on the act of

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reinscription of the mortgage; and if a stamp is necessary, the presumption is in favor of the officer. The other questions presented in the record merit no consideration.

It is, therefore, ordered that the judgment of the lower court, dismissing plaintiff's demand, be reversed; and it is now ordered that there be judgment in his favor, with costs, perpetuating the injunction herein for the excess of defendant's writ of seizure and sale, over and above the sum of three thousand four hundred and ninety-nine dollars and seven cents (\$3499 07), and the interest thereon, at eight per cent. from first July, 1867, for which sum and interest the said order of seizure and sale is hereby maintained.

It is further ordered, that as thus amended, the judgment be affirmed. Costs of appeal to be paid by J. T. Delmas and the Merchants' Mutual Insurance Company.

Rehearing refused.

Writ of error prayed for by *E. Wooldridge, E. Howard McCaleb and Campbell & Spofford*, of counsel for John T. Delmas, returnable to the Supreme Court of the United States.

ON THE APPLICATION FOR WRIT OF ERROR.

LUDELING, C. J. In this case an application for a writ of error to the Supreme Court of the United States has been made on the following grounds:

First—Because it is alleged there was drawn in question the application of article 127 of the constitution of the State of Louisiana, and that, by the judgment of the Supreme Court of Louisiana, the claim of petitioner was rejected, in violation of article 1, section 10 of the constitution of the United States.

Second—Because there was drawn in question the construction of an act of Congress relative to stamps, and the decree of the court was that the said act of Congress was inapplicable to the case.

We refuse to grant the writ of error on the first ground, because, under the settled jurisprudence of Louisiana, before the adoption of the present constitution of 1868 and since, the judgment of the court would have been the same, whether article 127 of the constitution had validity or not; and the article of the constitution was referred to only as an additional reason for the opinion of the court. *Armstrong v. Lecomte*, 21 An. 528; *A. D. Palmer v. H. Marston*, 22 An.: *Wainwright, administrator, v. Bridges*, 19 An. 234; *Dranquet v. Rost*, 21 An. 538.

“When the record shows that the State court might have disposed of the case, and for ought that appears, did decide it, without deciding any question under an act of Congress against the plaintiff in error,

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the Supreme Court of the United States has no jurisdiction." *Ocean Insurance Company v. Pulley*, 13 Peters 157; 15 Peters 18; 7 How. 172; 12 How. 3 (Curtis' ed.); 3 Wal. 246.

On the second ground the applicant is entitled to a writ of error.

It is therefore ordered that a writ of error be granted, returnable to the Supreme Court of the United States, in Washington City, D. C., on the first Monday of December next, 1870, on the plaintiffs in error giving a bond in the sum of five hundred dollars, conditioned, as the law requires.

SUPREME COURT OF THE UNITED STATES—No. 227—December Term, 1871.

John T. Delmas, plaintiff in error, v. the Merchants' Mutual Insurance Company, John Henderson et al.—In error to the Supreme Court of the State of Louisiana.

Mr. Justice Miller delivered the opinion of the court.

By the Civil Code of Louisiana the purchaser of property sold under a mortgage retains in his own hand the amount which his bid may exceed the sum necessary to satisfy the mortgage and costs of the proceeding under which it was sold. For this surplus he is responsible to the holders of other liens, if there be any, on the same property.

The case before us is a petition in the nature of the equitable bill of interpleader, brought by Henderson to have it determined by the court to which of several claimants such a surplus in his hands should rightfully be paid.

The contest finally became narrowed to Delmas on one side and the insurance company on the other, and this contest was decided by the Supreme Court of Louisiana in favor of the latter.

Delmas has prosecuted a writ of error, and relies upon two propositions ruled against him by that court as bringing the case within the revisory power of this court.

First—The first of these is that the court below decided that a judgment in his favor against the mortgaged property, which was otherwise conceded to be a valid prior lien, was void because the consideration of the contract on which the judgment was rendered was Confederate money.

Second—That the note under which the insurance company claimed had been extended as to time of payment, and the mortgage given to secure it reinscribed, without having the stamps affixed which such agreements required.

First—In regard to the first of these propositions, this court has decided, in the case of *Thorington v. Smith*, 8 Wallace 1, that a contract was not void because payable in Confederate money; and notwith-

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standing the apparent division of opinion on this question in the case of *Hanauer v. Woodruff*, 10 Wallace 482, we are of opinion that on the general principle announced in *Thorington v. Smith* the notes of the Confederacy, actually circulating as money at the time a contract was made, may constitute a valid consideration for such contract.

The proposition involved in this conclusion, however, does not of itself raise one of those federal questions which belong to this court to settle conclusively for all other courts. When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. Like many other questions of the same character, the federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other.

Accordingly, in several cases coming here on writ of error to the State courts, where the same question of the sufficiency of Confederate money and the sale of slaves as a consideration for a contract was the error complained of, we have dismissed the writ because it appeared that the State court had rested its decision on this ground of public policy, tested by which the contract was void when made. *Bethell v. Demeret*, 10 Wall. 537; *Bank of West Tennessee v. the Citizens' Bank*; *Worthy v. Marston*; *Sevier v. Haskell*; *Jacoway v. Denton*, not yet reported.

In the first of these cases the opinion of the Supreme Court of the State was expressly based on the general doctrine and the previous decisions of that court, and not on the constitutional provision. In the case of the *Bank of West Tennessee v. the Citizens' Bank of Louisiana*, that court speaks both of the constitutional provision and the adjudications of that court made prior to the adoption of the article 127 of the Constitution. And as it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control, and was sufficient to support the judgment, because another reason was given which, if it had been the only one, we could review and might reverse.

In the case before us that court say in express language that they hold the judgment of the plaintiff in error void, because the 127th section of the State constitution declares that it shall be so held. That article reads as follows: "All agreements, the consideration of which was Confederate money, notes or bonds, are null and void, and shall not be enforced by the courts of this State."

This provision was made a part of the Constitution of Louisiana

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after the contract now in dispute was made, and if the contract was valid then, this provision clearly not only impairs but absolutely destroys its obligation within the meaning of the tenth section of the first article of the Constitution of the United States.

It has long been settled, that under the Act of Congress of 1824, and by reason of the peculiarity of the practice in the courts of that State, the opinions delivered by the appellate court of Louisiana are treated by us as part of the record, and are looked into to learn what they decided when their judgments are brought here by writs of error. *Cousin v. Blain's Ex.*, 19 H. 207; *Almonaster v. Kenton*, 9 H. 9.

So long as they in those opinions placed the invalidity of this class of contracts on the ground of a public policy existing at the time the contract was made, or so long as they left us to infer that such was the ground, having once before so decided, the decision presented no question over which we had any revisory power. But when, going a step further, they expressly rest the decision of the same question on the constitutional provision we have quoted, and on no other ground, the question necessarily arises, is that provision in conflict with the Constitution of the United States? And the answer to this question depends solely on the validity of the contract when made, for, if valid then, the federal Constitution protects it from all subsequent acts of State legislation, whether in the form of constitutional or ordinary legislative enactments. *Hart v. White*, 13 Wallace, 650.

It may be said that since we know that the Supreme Court of Louisiana has in other cases held this class of contracts void in their inception, for the very reasons for which the Constitution annuls them, we are bound to follow the State courts in that decision. But, as we have already said, this is not the class of questions in which we are bound to follow the State courts. It is not based on a statute of the State, or on a construction of such a statute, nor on any rule of law affecting title to lands, nor any principle which has become a settled rule of property, but on those principles of public policy designed for the protection of the State or the public, of which we must judge for ourselves, as they do when the question is fairly presented.

Besides, this court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the State courts, giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation. *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 145; *Jefferson Branch Bank v. Skelley*, 1 Black, 446.

These views are in precise conformity to what has been held by this

court in the analogous subject of slaves as a consideration of contracts made before the abolition of slavery. The case of *Worthy v. Marston*, decided at this term before the recess, was a writ of error to the Supreme Court of Louisiana, on the ground that that court had held such a contract void. And it was urged that it was so held by that court under section 128 of the Louisiana constitution, which declared contracts for slaves void, in the same terms that section 127 declared contracts for Confederate money void; but this court dismissed the writ of error for want of jurisdiction, because the Supreme Court of Louisiana had said in its opinion that it did not place the decision on the constitutional provision, but on the ground that the same principle had been promulgated and acted on in that court before the constitutional provision was adopted.

Yet, in the case of *Hart v. White*, 13 Wallace 646, in which the Supreme Court of the State of Georgia held such a contract void by reason of a provision in the constitution of that State, adopted after the contract was made, this court entertained jurisdiction and reversed the judgment. This was done on the ground taken in the present case, namely, that the contract being in our judgment valid when made, any constitutional provision which made it void was in violation of the federal Constitution on the subject of impairing the obligation of contracts; and any judgment of a State court resting on such enactment of a State constitution, after the date of the contract, must be reversed in this court on error.

We are of opinion, for these reasons, that there was error in the Supreme Court of Louisiana in deciding that the judgment of Delmas was void by reason of the constitutional provision of that State concerning contracts for which Confederate notes were the consideration.

As the case must be reversed for this reason, we might pass without examination the question raised in regard to the necessity of stamps on the extension of time for the payment of the note, and on the reinscription of the mortgage; but as that may arise again in the further progress of the case, we will dispose of it now. As regards the latter, which is the mere act of the party who holds the mortgage, we are at a loss to perceive any ground on which this act of reinscription—the same as recording a deed the second time—can be held to be an agreement requiring a stamp. The assent of the mortgageor is not necessary, nor was it asked or given.

Nor do we believe it was the purpose of the stamp act to hold a mere extension of the time of payment, indorsed on the note, without any consideration for such extension, or change in any other term or condition of the contract, to be an agreement requiring a stamp.

In the case of *Pugh v. McCormick*, decided at the present term, it was held that the indorsement of a note by which the bill passed to the

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indorsee, did not require a stamp, and also that the writing on the back of the note by the indorser waiving demand, protest and notice, and agreeing to be liable without them, was good without a stamp. We think this ample authority for holding that a gratuitous extension of time did not require a stamp, as both the writings relied on in that case have more of the elements of an agreement than the one before us. In the matter of the stamp we think the court committed no error.

But, for the error first considered, the judgment is reversed, and the case remanded for further proceedings, in conformity to this opinion.
D. W. Middleton, C. S. C. U. S.

UNITED STATES OF AMERICA, ss.—The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Louisiana—Greeting:

Whereas, lately, in the Supreme Court of the State of Louisiana, before you, or some of you, in a cause between John Henderson, plaintiff and appellant, and the Merchants' Mutual Insurance Company, John T. Delmas and others, defendants and appellees, and John T. Delmas, appellant, and the Merchants' Mutual Insurance Company, John Henderson et al., appellees, wherein the decree of the said Supreme Court entered in said cause on the fifteenth day of November A. D. 1870, is in the following words, viz:

“It is ordered that the judgment of the lower court dismissing plaintiff's demand be reversed, and it is now ordered that there be judgment in his favor with costs, perpetuating the injunction herein for the excess of defendant's writ of seizure and sale over and above the sum of three thousand four hundred and ninety-nine dollars and seven cents, and the interest thereon at eight per cent. from first July, 1867, for which sum and interest the said order of seizure and sale is hereby maintained. It is further ordered that as thus amended the judgment be affirmed; costs of appeal to be paid by John T. Delmas and the Merchants' Mutual Insurance Company. As by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States, by virtue of a writ of error, sued out by John T. Delmas. agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and seventy-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of the record, and was argued by counsel, on consideration whereof, it is now here ordered and adjudged by this court,

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that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that the said John T. Delmas recover against the Merchants' Mutual Insurance Company, John Henderson et al., one hundred and forty-one dollars and forty-seven cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby remanded to the said Supreme Court, for further proceedings to be had therein, in conformity with the opinion of this court.

And the same is hereby remanded to you, the said judges of the said Supreme Court, in order that such execution and further proceedings may be had in the said cause, in conformity to the judgment and decree of this court above stated as, according to right and justice and the constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and seventy-one.

On motion of E. H. McCaleb, of counsel for John T. Delmas, one of the defendants in the case of John Henderson v. Merchants' Insurance Company et als., and on filing the opinion and mandate of the Supreme Court of the United States, reversing the decision of this court in this case and remanding the same for further proceedings in conformity with said opinion, it was ordered that this case be reinstated and fixed.

After hearing, the court delivered the following opinion :

TALIAFERRO, J. From the decision rendered by this court in the above entitled case in November, 1869, it was taken by writ of error to the Supreme Court of the United States and the judgment of this court reversed. In pursuance of the mandate from that court directing further proceedings in this case we now order and decree as follows, viz: That the surplus of the proceeds of sale of the property of Joseph Menard, viz., the sum of thirty-four hundred and ninety-nine dollars and seven cents remaining in the hands of the plaintiff John Henderson, who purchased said property at sheriff's sale on the first day of July, 1867, be paid over to John T. Delmas, a judgment creditor of Joseph Menard having judicial mortgage to the amount of four thousand five hundred and sixty dollars and fifty cents, with interest, that the injunction be perpetuated; the Merchants' Mutual Insurance Company paying costs of this appeal, and the further sum of one hundred and forty-one dollars and forty-seven cents to J. T. Delmas, costs accrued in the Supreme Court of the United States.

No. 2789.

25 353
48 704

CASS & DOWLING v. L. S. ROUARK—J. A. O'BRIEN, Intervenor.

Where the plaintiff, in a suit against D, seized certain bales of cotton by attachment, in the hands of A, to whom the cotton had been shipped, and A intervened, and alleged he had privilege on said cotton for advances to make it and for charges pa'd on the same, which was in his possession, and D bonded the property after the intervention of A;

Held—That the intervention and third opposition could not be excepted to as premature. The intervention could not be considered as dismissed by the bonding. The bond remained in lieu of the property seized and released.

The intervention could only be made while the suit was pending; and there is no good reason why the third opposition should not be made at the same time, in order that the relative rank of the contesting creditors should be settled in one suit.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. McGloin & Kleinpeter*, for plaintiffs and appellees. *Roselius & Philips*, for intervenor and appellant.

HOWE, J. The plaintiffs seized certain cotton by attachment. O'Brien came in by way of third opposition, claiming a privilege on the cotton and its proceeds. The plaintiffs filed many exceptions to the right of the opponent to come in, of which the court below sustained one, namely, that the opposition was premature. The opponent appealed.

The judge below may have erred in the reasons he gave, and yet his judgment be practically correct.

It appears by the record, that the defendant in the suit bonded the cotton attached, and it was released to him. The bond was left to respond to the plaintiffs' rights, but the opponent could take no advantage of it. He could have no privilege on the bond, nor any proceeds which might be realized by the enforcement of its obligations. He never seized the cotton himself. From the moment that the cotton went out of court his opposition perished.

Judgment affirmed.

ON REHEARING.

LUDELING, C. J. The plaintiffs sued L. J. Rouark, a resident of Mississippi, and attached thirteen bales of cotton in the hands of John A. O'Brien, to whom the cotton had been shipped in New Orleans.

O'Brien intervened, and alleged that he had a privilege upon said cotton for advances made to Rouark to make the crop of cotton and for charges paid on said cotton, which was in his possession, the same having been shipped to him by the defendant in accordance with their contract, whereby he agreed to make the said advances. The defendant bonded the property after this intervention. The plaintiff filed exceptions to the intervention, one of which the judge *a quo* sustained, to wit: that the intervention was premature. The intervenor appealed.

 Cass & Dowling v. Rouark.

In our former opinion we said that the release of the property by bonding destroyed his opposition. This was an error. The intervention and third opposition could not be dismissed by the bonding of the property by either the defendant or plaintiffs. The bond remained in lieu of the property, to respond for whatever judgment might be rendered in the case.

The intervention and third opposition was not premature. The intervention could only be made while the suit was pending, and there exists no good reason why the third opposition should not be at the same time, in order that the relative rank of the contesting creditors should be settled in one suit.

The evidence shows that O'Brien made advances of plantation supplies, etc., to make the cotton; that the cotton was shipped to him to reimburse him for said supplies and advances made on the cotton, and that the cotton was in his possession at the time it was attached by the plaintiffs.

Under these circumstances we think the intervention and third opposition should have been sustained.

It is therefore ordered and adjudged that the decree of this court heretofore rendered be set aside; that the judgment of the lower court be annulled, and that there be judgment in favor of the intervenor and third opponent, O'Brien, against L. J. Rouark for the sum of \$1611 32, with five per cent. per annum interest from the first of January, 1869, until paid and costs, and that said sum be paid out of the proceeds of the sale of said thirteen bales of cotton by preference, and the remainder, if any there be, be applied to the payment of the judgment of Cass & Dowling, the plaintiffs. Costs of appeal to be paid by the appellees.

 No. 2867.

TIMOTHY McCARTY, for the use of A. A. GREELY, v. THE LOUISIANA MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

Where the plaintiff, claiming for the use of A, judicially admitted that the insurance on a house was effected by him on behalf and for the benefit of said A;

Held—That the court *a quo* erred in not permitting defendant to show that A had set the house on fire, and further erred, under the circumstances of the case, in not allowing defendant to prove plaintiff's declaration, after the fire, that the premises were not his and that he had never possessed any insurable interest therein, notwithstanding his title had been received in evidence.

APPEAL from the Fifth District Court, Parish of Orleans. *Leau-mont, J. C. B. Singleton and J. Fisk*, for plaintiff and appellee. *Race, Foster & Merrick*, for defendant and appellant.

WYLY, J. The plaintiff sues for \$800, the amount of an insurance on a frame cottage, which was burned on the night of June 7, 1869,

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and he prays that "judgment be rendered in favor of petitioner for the use of Albert A. Greely, for whose use and benefit said policy was effected."

The defendant admits the issuance of the policy, but alleges "that the same is null, and that no risk was taken under the same, for reason of fraud and misrepresentation of petitioner, McCarty, in making his application for the same; that he then represented and held himself out as the owner of the property sought to be insured, and the policy issued to him personally and not as agent for any person or for the use and benefit of any other person, and said McCarty had no ownership or interest in said property and no insurable interest in it, and nothing was therefore insured, nor was any risk taken under said policy; that so soon as the true facts were learned, and the fraud of McCarty made apparent, respondent offered to refund all the moneys received as premiums, notifying McCarty that there was no legal policy and no risk assumed; that A. A. Greely has no interest in said policy, as the same was not issued in his behalf, nor for his interest; that the property was set on fire by the owner himself, as respondents are informed, and if the policy had been good and legal, and not null and void because of fraud, in no event could respondent be held liable thereon."

The court gave judgment for the amount claimed, and the defendant appeals. We think the court erred in not permitting the defendant to prove that the house was set on fire by Albert A. Greely, for whose use and benefit the plaintiff judicially admits the insurance was effected.

We think the court also erred in not receiving the testimony of defendant's witness to prove that "a few days after the fire in question Timothy McCarty went to the office of the defendant, spoke of the fire, did not pretend to claim the amount of the insurance, said the premises insured were not his, and that he never had any insurable interest therein, and only asked as a favor that defendant would pay the three bills (for the funeral expenses of Mrs. Greely), amounting in all to \$92 50; he would return the policy of insurance on their payment; that the money paid for premiums both times belonged to said Greely." It was certainly competent to prove McCarty's statement that the money paid for premiums belonged to Greely. In view of the allegation of fraud and misrepresentation of McCarty when effecting the insurance as to the ownership of the property insured, and considering the fact that the possession of the property still remained in Greely, notwithstanding the deed to McCarty, we are of the opinion that the defendant had the right to prove the admissions of McCarty after the fire occurred, to wit: that he did not claim the amount of the insurance, that the premises were not his, and that he never had an

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insurable interest therein. We think this evidence was admissible, notwithstanding McCarty's title had been received in evidence, and the bills of exceptions were well taken.

In view of the erroneous ruling of the court concerning the introduction of evidence, it becomes necessary to remand this case.

It is, therefore, ordered that the judgment herein be annulled, and that this cause be remanded for new trial, according to law and the views herein expressed; appellee paying costs of appeal.

No. 4455.

THE STATE ex rel. ST. CHARLES RAILROAD COMPANY v. JOHN
COCKREM, Administrator, and als.

The civil government of the city of New Orleans can not be permitted to deny the rights derived by the relators in this case from their contract with said city on the ground that it was under military authority at the time, when, after the cessation of that military authority, those rights have been, in part, frequently recognized and ratified by its ordinances. That contract was an entirety. The city had no right to sever its obligations, so as to ratify one part of the contract and reject another.

The city, having for a number of years received without objection the consideration of the contract, should not be heard when disputing the contract itself.

The plea that the parties had forfeited the right of way by voluntarily abandoning the construction of railroads in certain streets, and by failing to construct said roads within the time limited by the contract, is not made out, when proved that they were prohibited to do the work by an injunction from a third party; and because the injunction taken in September, 1866, was not dissolved before June, 1872, it is not to be inferred that it was kept so long in force by the wish and connivance of the relators, when the city was a party to the injunction suit, and having the same right to push the case that the relators had, did not do so.

The city surveyor was bound, when called upon, to furnish the requisite lines and levels for the building of the road—a ministerial duty which was imposed upon him by the sixth section of the original ordinance authorizing the construction of the road.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Breaux, Fenner & Hall*, for relators and appellees. *Geo. S. Lacey*, City Attorney, and *Frank N. Butler*, for defendants and appellants.

TALIAFERRO, J. The relators set forth that they obtained by contract with Nicholson & Co. all the rights and privileges the latter were entitled to under a contract with the City of New Orleans, entered into in December, 1865, to construct a railroad to connect the depot of the Pontchartrain Railroad with that of the New Orleans, Jackson and Great Northern Railroad; that under that contract, to all the rights of which the relators are subrogated, it is provided that the City Surveyor shall furnish the lines and levels for the road and give, in his specifications, full directions how the work is to be done, the kind of material to be used, etc; that Nicholson & Co. completed that portion of the railroad above Canal street, and which relators have had constantly in operation, paying to the city the stipulated *bonus*; that relators were proceeding according to contract to complete the portion of the road lying below Canal street when they were arrested by a

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writ of injunction, issued by the Fourth District Court at the instance of Romanzo W. Montgomery, to which the City of New Orleans was a party; that said injunction remained in force until June, 1872, when it was dissolved; that thereupon the relators called upon the City Surveyor to furnish them with the lines and levels required in order that they might commence the work, and were refused on the ground that he could only act under an order from the Administrator of Public Improvements; that relators then applied to John Cockrem, Administrator of Public Improvements, for the same purpose, and were likewise refused by him. The relators then filed a petition in the Eighth District Court, praying that a *mandamus* issue against Cockrem, the Administrator of Public Improvements, and Bell, the City Surveyor, to compel them to furnish the lines and levels required. To this proceeding the city of New Orleans and C. E. Girardey and others, to whom the city in November, 1871, had granted the privilege of constructing the unfinished portion of the railroad, were made parties. A rule *nisi* was granted. To this Cockrem and Bell responded, denying all right in the relators to be furnished with the lines and levels they demanded. They deny that the relators derived any right from the assignment to them from Nicholson & Co., who derived no right from the alleged contract they made with the city in 1865 and 1866, the same having been entered into in contravention of a prohibitory order rendered by the military authority then paramount in the State. That the relators connived at the injunction proceeding of Montgomery, which was illegally and wrongfully kept in existence for several years in order that the relators might obtain an undue advantage; that the city of New Orleans, considering the invalidity of the pretended grants, privileges and franchises asserted by the relators and the waiver, non-user, negligence and abandonment of the same on the part of the relators, conveyed the right of way and the consequent right to lines and levels to the streets in controversy to other parties with whom the relators can not legally interfere. Respondents object that the law does not authorize the issuing the writ of *mandamus* in the case at bar. Girardey & Co. adopted all the defenses set up by the City Surveyor and the Administrator of Public Improvements. The rule was made absolute and the court ordered that John Cockrem, Administrator of Public Improvements, furnish to the relators the lines and levels required to enable them to construct the road according to the specifications in the original contract.

From this judgment the respondents appealed.

On the part of the defendants it is contended that the city, having repudiated the contracts with Nicholson & Co., and the pretended rights of their subrogees the St. Charles street Railroad Company, in so far as these contracts accorded the right of way for a railroad on

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Royal and Bourbon streets; and moreover the city authorities having entered into contracts with Girardey and others for the construction of a railroad on those streets, no city officer had any right to disregard such action of the municipal authorities, and consequently no authority to furnish the relators with the lines and levels they required. That under the existing state of facts the furnishing to the relators the facilities they demand, so far from being a mere ministerial duty which the proper officer might by mandamus be compelled to perform, would be a violation of his duty and a setting at naught the will of the corporate authorities. That the relators can not, therefore, in this case, proceed by mandamus.

In defense it is set up, that, by a military order rendered by General Canby, on the ninth of February, 1866, the several bureaus of the municipal government of the city of New Orleans, created by and acting under military authority, were enjoined and prohibited from granting any franchise or right to corporations, for a term extending beyond such period as the civil government of the city may be reorganized and re-established under and in conformity to the constitution and laws of the State; and that no grant of that character should extend beyond the time when the questions relative to those rights may be determined by competent authority.

To this it is answered that the ordinances of the city authorities authorizing the building of this railroad and the contract entered into in conformity therewith, between the city and Nicholson & Co., for the building of the same, took place before the military order of General Canby was rendered, and that nothing in that order justifies the conclusion that it intended to annul that or any other contract of the kind entered into prior to its promulgation; and that the order of General Canby of February 9, 1866, was so understood, for the city by ordinance of sixteenth of December, 1867, after the transfer of the contract by Nicholson & Co. to the St. Charles Street Railroad Company expressly substituted the latter to all the rights, privileges and obligations of Nicholson & Co. in their contract. And later still, on the twenty-sixth of July, 1870, the city, by an ordinance to that effect, allowed the St. Charles Street Railroad Company to make certain alterations the company desired to make in the track of the road. Besides, it is shown that the city, by ordinance of eleventh May, 1869, reduced the bonus to be paid on a certain consideration. It is further shown that the St. Charles Street Railroad Company have been constantly operating that part of the said road lying above Canal street ever since they acquired it under the contract with Nicholson & Co., and that the city has regularly received the stipulated bonus on passengers carried without objection. It seems, then, as contended by the relators, that the civil government of the city since the termina

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tion of the military authority, has frequently recognized and ratified by its ordinances the rights of the relators under the Nicholson contract. That contract was an entirety, embracing as well the line of the road below Canal street as that portion above it. The city, it would seem, has no right to sever its obligations, to ratify one portion of its contract and reject another. The right of way was not given to Nicholson & Co., but was sold to them, and the consideration was not only that they should incur the expense of building the railroad, but also that they should pay to the city a certain bonus or percentage upon the fare of each passenger carried. This bonus it appears has been regularly paid by Nicholson & Co. and their subrogees, and been received by the city as the consideration of the contract between the city and Nicholson & Co. The city having for a number of years received without objection the consideration of its contract should not now be heard to dispute the contract itself.

On the part of the city it is held, that the relators, if they ever had the right of way for a road below Canal street, along Bourbon and Royal streets, have forfeited it by virtually abandoning the construction of the road along those streets, and have failed to construct the road within the time required by the contract. It is in proof, that Montgomery, a property holder on Royal street, obtained an injunction, in September, 1866, prohibiting the building of the contemplated road on that street, and that this injunction was not dissolved until June, 1872. We are unable to find in the evidence anything making good the charge of the defendants, that the injunction was kept in force so long by the wishes and by the connivance of the relators. The city was a party to this injunction suit, and had the same right to push the case to trial that the relator had, but did not do so.

We conclude that the city was without authority to enter into the contract with Girardey and others, granting to them the right of way to construct below Canal street the road projected originally by the contract of the city with Nicholson & Co., which contract was afterward extended and entered into with the relators. The contract made with the relators being valid and binding, their rights under it cannot be affected by the subsequent agreement between the city and Girardey & Co. The latter party, when cited, came forward, and, without exception, answered to the merits of the case. The city surveyor was bound, when called upon, to furnish the requisite lines and levels for the building of the road, a ministerial duty, which was imposed upon him by the sixth section of the original ordinance authorizing the construction of the road. The proceeding in this case by mandamus seems not to be irregular.

It is, therefore, ordered that the judgment of the district court be affirmed, with costs.

Hugh v. Hernandez and al.

No. 3581.

JAMES HUGH v. JOSEPH HERNANDEZ and al.

The action against the sureties of a sheriff for money collected by him and not accounted for to the party entitled to it, is barred by the prescription of two years. Revised Statutes of 1870, section 2816.

The law has not given the summary remedy by rule against sureties on a sheriff's bond, and where the rule was made absolute, and in a subsequent action of nullity, said judgment was set aside on the ground that no citation had been served on the parties, the prescription of two years was not interrupted by the instituting of such a proceeding against the parties

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. J. A. Bartlette*, for plaintiff and appellant. *Charvet & Duplantier, J. Durigneaud* and *E. Bermudez*, for defendants and appellees.

TALIAFERRO, J. This is an action against the sureties of a sheriff, to compel them to pay a sum of money alleged to have been received by him acting in his official capacity, and which he neglected to pay over to the plaintiff, who claims that he is entitled to receive it.

The defense is placed on several grounds, one of which, and the one we deem most important, is prescription. The plea of prescription of two years was sustained by the court below, and the suit dismissed. The plaintiff has appealed.

The facts are as follow: In 1866, Bienvenu, sheriff of the parish of Orleans, sold certain stocks, seized under execution, from the sale of which he realized the sum of \$6232 50. The sale was made on the twenty-sixth of March, 1866, and on the next day a rule was taken on the sheriff to show cause why he should not pay over the money so received to Joseph Lalande, a party setting up a claim to it. On trial of the rule, on the sixteenth May, 1866, it was dismissed, but the sheriff was ordered to pay over the money to Ingraham, the judgment creditor, at whose instance the seizure and sale of the stocks were made, and who transferred the judgment and all his rights under it to the plaintiff. On the third of July, 1867, the sheriff having failed to pay, a rule was taken on his sureties, to show cause why they should not be condemned *in solido* with him. On the third of December, 1867, this rule was made absolute, and the sureties were accordingly condemned *in solido* with the sheriff, to pay the money. Subsequently an action of nullity was brought to set aside this judgment, on the ground that no citation had been served upon the sureties. The judgment was annulled on that ground, on the twelfth January, 1869, and the decree of the Fifth District Court annulling it, was confirmed on appeal to this court. See 22 An. 245. On the twelfth of May, 1870, the present suit was brought.

The defendants, therefore, say that between the twenty-seventh of March, 1866, or the sixteenth of May, 1866, or the third of July, 1867,

and the twelfth of May, 1870, more than two years have elapsed, and that the sureties are discharged under the law invoked by them. Ray's Revised Statutes, section 3546. "The sheriff and their securities shall be able to prescribe against their acts of misfeasance, nonfeasance, costs, offenses, and quasi offenses after the lapse of two years from the day of omission or commission of the acts complained of."

But the plaintiff contends that his suit is not for damages arising from negligence nor for misfeasance or nonfeasance; neither is it for offenses or quasi offenses, nor for any act mentioned in the law prescribed by two years—but that it is simply for money the sheriff has received while acting as mandatary, or depositary, or sequestrator. That in executing the writ under which he received the money he acted as the judicial agent of the plaintiff, and refers to 2 L. R. 280 and to the case of Spalding & Rogers v. John P. Walden et al., 23 An. 474.

The plaintiff holds further that if the prescription of two years were applicable to a case like this it was interrupted by the rule taken on the sheriff and his sureties on the third of July, 1867, which was served on the sheriff and all the sureties. On the first ground we think the authorities cited are not in point. The facts of the case in 23 An. differ materially from those presented in the case before us. In that case the suit was for money received by the sheriff during the late war and put in bank for the owners, who were absentees; the sheriff, by reason of military orders then in force, was unable to withdraw the deposit to settle the claim. The act of the sheriff was held to be neither an act of misfeasance or nonfeasance, nor was the suit placed on that ground. In the case under consideration the petition of the plaintiff charges: "That the said Bienvenu, sheriff, failing to pay over the proceeds of the sale on demand being made for that purpose, a rule was taken upon him by petitioner and notice thereof given to said sureties, and on the third of December, 1867, judgment was rendered on said rule against the said sheriff for \$3343 18, with interest, etc., in favor of petitioner; that on said judgment execution issued and was returned, no property found," etc. The sheriff had sold certain stocks seized under the execution issued upon the judgment of the plaintiff's transferrer, received a large sum of money in cash, and after an order of court to pay it over to the party entitled to it he declined and failed to comply with the order, and an execution issued against him was returned *nulla bona*.

On the second ground, that the service of the rule interrupted prescription. In the action to annul the judgment rendered on the third of July, 1867, it was decided that the law has not given the summary remedy by rule against sureties on a sheriff's bond. That the want of citation of the sureties was fatal since they did not answer or other—

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wise waive citation. There having been no citation there was no interruption of prescription. 6 Rob. 142, 2 An. 927.

We think the judgment of the court below was correctly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs. *Kohler v. Walden*, 23 An. 279; *Wenz v. Lederer*, 24 An. 17; *Fuqua, Administrator, v. Young & Knighton*, 14 An. 216; 3 R. 297.

ON REHEARING.

MORGAN, J. Another and a careful examination of the opinion heretofore pronounced by us in this case, has only satisfied us that the conclusions to which we came originally are correct.

It is therefore ordered, adjudged and decreed that our former judgment remain undisturbed.

WYLY, J., *dissenting*. In this case the question is, Is the action against the sheriff and his securities to compel him to pay over the money he has collected barred by the prescription of two years?

"The sheriffs and their securities shall be able to prescribe against their acts of misfeasance, nonfeasance, costs, offenses and quasi offenses, after the lapse of two years from the day of the omission or commission of the acts complained of." Revised Statutes of 1870, section 2816.

Now, the cause of the obligation sought to be enforced against the sheriff and his securities is not an act of omission or commission of some wrong on the part of the sheriff. Nor did the obligation sought to be enforced spring from an offense or quasi offense. It had its origin in a quasi contract. The moment the money fell into the hands of the sheriff, he incurred a legal obligation to preserve it, and to restore it to the owner at the end of the suit. In getting the money the sheriff certainly committed no act of misfeasance nor nonfeasance, nor an offense nor a quasi offense. Yet the very getting of it created the obligation now sought to be enforced. The plaintiff is now asking the sheriff to perform the obligation that he then incurred.

The difficulty in this case only arises from mistaking the reason for the suit for the cause of the obligation. The cause of the obligation is one thing, and the reason for the suit is another. The sheriff failed or refused to pay over the money; this was the reason for the suit, but not the cause of the obligation. The obligation existed long before there was any failure or refusal to pay over the money.

Hence the obligation, which the defendants insist is discharged by prescription, is not an obligation arising from the refusal or failure of

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the sheriff to pay over money. It existed from the moment the sheriff received the money, and this suit is to compel the performance of that obligation.

Now, because the law allows the sheriff and his securities to prescribe against his acts of omission and commission, shall we extend that prescription to obligations arising from a quasi contract? I think not. Laws of prescription are *stricti juris*, and are never extended by implication.

I adhere to the opinion of this court on this question in *Spalding & Rogers v. Walden*, 23 An. 474; and I believe upon that authority and upon principle that the judgment of the majority of the court is wrong. I therefore dissent.

 No. 4657.

MERCHANTS' MUTUAL INSURANCE COMPANY v. SAMUEL JAMISON.

25	363
49	1021
25	363
114	824

Where the evidence shows that A owed the Merchants' Mutual Insurance Company ten thousand dollars; that he executed in favor of said company a mortgage of fifteen thousand dollars to secure the payment of two promissory notes, one for \$10,000 and the other for \$5000, to the order of the maker and indorsed in blank; that he tried to have the company to discount these notes and pay itself out of the proceeds; that the company took the ten thousand dollar note, but returned the five thousand dollar note to the maker; and that B became the owner of it in good faith and for a valuable consideration; Held—That on the Merchants' Mutual Insurance Company foreclosing the mortgage for the ten thousand dollar note and becoming the purchaser of the property at sheriff's sale, it had no right to curtail that mortgage to its advantage; that there was no extinguishment thereof by confusion, and that B had a right to one-third of the net proceeds of the sale.

A PPEAL from the Sixth District Court, parish of Orleans, *Saucier, J. Albert Voorhies*, for plaintiff and appellee. *Semmes & Mott*, for John A. Turnell, holder of concurrent mortgage, appellant.

LUDELING, C. J. Samuel Jamison executed a mortgage to secure two promissory notes, one for ten thousand dollars, and the other for five thousand dollars, payable to the order of the maker, and by him indorsed in blank. The mortgage was in favor of the Merchants' Mutual Insurance Company.

The evidence shows that Jamison owed the Insurance Company ten thousand dollars, that he executed this mortgage for fifteen thousand dollars and tried to get the company to discount the notes and pay itself out of the proceeds. The Company took the ten thousand dollar note, but refused to discount the paper, and returned the five thousand dollar note to the maker, who disposed of it, and John A. Turnell became the owner of it in good faith before maturity and for a valuable consideration.

The Merchants' Mutual Insurance Company foreclosed the mortgage, to enforce the payment of the ten thousand dollar note and became the purchaser of the property at sheriff's sale for the price of ten thousand dollars.

Merchants' Mutual Insurance Company v. Jamison.

The company then took a rule on John A. Turnell, the holder of the other note, to show cause why the mortgage should not be canceled, on the ground that the plaintiff had been the holder of both of the notes, and that one of the notes had been returned by them to the maker, and was thus extinguished by confusion, and having been re-issued by the debtor, was but an ordinary debt in the hands of the holder. To this Turnell answered that he had purchased the note in good faith, before maturity and for a valuable consideration, and claimed his *pro rata* of the proceeds of the sale, as the holder of one of the notes secured by the mortgage.

The error of the plaintiff is in supposing the Merchants' Mutual Insurance Company was ever the holder or owner of the five thousand dollar note, or that the note was ever returned to the maker, after it was issued. It was offered to the company for discount, but they refused it. But this refusal to discount this note did not prevent the maker from selling it elsewhere as a note secured by the mortgage. The mortgage was for fifteen thousand dollars; by refusing to discount the five thousand dollar note, the Merchants' Mutual Insurance Company could not curtail that mortgage to its advantage and the disadvantage of the mortgageor.

The judgment of the lower court, practically decreeing that the note held by John A. Turnell was not secured by said mortgage, is erroneous.

It is therefore ordered and adjudged that the judgment of the court *a qua* be set aside, and that there be judgment in favor of defendant against the plaintiff for one-third of the net proceeds of the sale of the mortgaged property, to wit, for the sum of three thousand one hundred and thirty-six dollars and forty-four cents, and costs of both courts.

Rehearing refused.

No. 4700.

JOHN E. BREAUX v. J. B. LEJEUNE.

This is a controversy for the office of sheriff of the parish of Pointe Coupee. The suit is brought in plaintiff's own name. He mistook his remedy. The proceeding should have been under the "Intrusion Act." It was not authorized by act No. 41, of the acts of 1873.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J. Wickliffe & Fisher, Farrar & Montgomery*, for plaintiff and appellee. *E. Phillips* and *A. D. M. Haralson*, for defendant and appellant.

WYLY, J. This is a controversy for the office of sheriff of the parish of Pointe Coupee, and from the judgment decreeing the plaintiff to be the legal sheriff, the defendant appeals.

Breaux v. Lejeune.

The suit is brought in plaintiff's own name. We think he has mistaken his remedy. The proceeding should have been under the "Intrusion Act." *Hays v. Thompson*, 21 An. 655; *State v. Delassize*, 21 An. 710; *State v. Dranguet*, 23 An. 784.

The suit was not authorized by act No. 41 of the acts of 1873, as claimed by the plaintiff.

It is, therefore, ordered that the judgment herein be annulled; and it is now ordered that the injunction be dissolved, and this suit be dismissed, at plaintiff's costs in both courts.

No. 3930.

CHARLES HODGES v. GRAHAM, HODGES & Co., in Liquidation. E. J. HART, Garnishee.

The garnishee is a stakeholder, and on his answers the judgment should be for or against him. He has no interest in the contest between the creditor and debtor. But where the object of a motion to strike out part of the answers of the garnishee and of the traverse of the answers, is to attack the settlement made between the garnishee and the judgment debtor, the garnishee must be permitted to explain that he holds the thing attempted to be seized, by virtue of a title acquired by a settlement between himself and his debtor.

The plaintiff can not be allowed to change his garnishment process into a revocatory action. His remedy is by a direct action.

The garnishee can not be divested of his possession and alleged ownership through any process which would deprive him of explanations and defenses allowable in a direct action by the judgment debtor to recover his property.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Henry B. Kelly; Walter H. Rogers and W. W. Howe* for plaintiff and appellant. *Semmes & Mott* for garnishees. *H. R. Schmidt* curator *ad hoc*.

KENNARD, J. The plaintiff, Charles Hodges, having obtained on the nineteenth of June, 1871, a judgment against Graham, Hodges & Co., in liquidation, and the several members of the firm, Augustus C. Graham, Charles E. Goodwyn and William R. Hodges, for the sum of fifteen thousand eight hundred and forty-three dollars and ninety-five cents, issued a *fi. fa.*, and garnisheed E. J. Hart & Co., a commercial firm, domiciled in New Orleans, addressing to them twelve original and nine supplemental interrogatories of a most comprehensive character.

The garnishees made answers to the twelve original interrogatories, and under the ninth and twelfth answers set up the following special explanations as defenses, to wit:

First—We accounted for said consignments by settlements made with Charles E. Goodwyn on the fifteenth March, 1865, after the dissolution of the firm of Graham, Hodges & Co., which had taken place first of June, 1864; this settlement made by said Goodwyn was

acquiesced in by all the members of the firm, and it was made under the following circumstances: Charles E. Goodwyn at the time was largely a creditor of his firm on settlement with his copartners. Graham's account was balanced and there was nothing to his credit, and W. R. Hodges was in no better condition, while Goodwyn was largely a creditor as above. We were not only creditors of Graham, Hodges & Co., but also creditors of Goodwyn individually. Graham, Hodges & Co. were indebted to us on several accounts, viz: for advances on brandy consigned on joint account; for advances on whisky, on general merchandise account and for loans. The brandy account has been closed by a compromise made with Charles Hodges, the plaintiff in this suit, with the assent of W. R. Hodges, as appears by a copy of said compromise "of suit No. 5198 in the United States Circuit Court in the District of Louisiana, hereto annexed, marked 'C.'"

Second—That "the indebtedness to them on general account and loans, as appears by their own books, amounts to a very large sum of money, greatly exceeding the value of the whisky, after deducting the special advances."

Third—"That said settlement cannot be attacked by garnishee process, and that the only mode in which its validity can be questioned, is by direct action."

Fourth—That Charles Hodges, having at the time it was made, full knowledge of said settlement when made, or shortly afterward, is estopped from attacking it.

Fifth—That Charles Hodges, plaintiff, is not now, and was not at the time he instituted suit in this court, and has not been since twenty-seventh September, 1864, a creditor of Graham, Hodges & Co.; that on the contrary, on the twenty-seventh September, 1864, he was a debtor to Graham, Hodges & Co. in a sum exceeding \$15,000, on a general balance of accounts.

Sixth—That this judgment was obtained by the fraud and collusion of W. R. Hodges with the plaintiff, Charles Hodges, his brother.

Seventh—That W. R. Hodges had, on his own petition, November 21, 1868, been adjudicated a bankrupt, in New York; that on his schedule then filed, his brother, Charles Hodges, was not recognized as a creditor, nor did he place this alleged claim against these garnishees as an asset on his schedule; that Wm. R. Hodges was a witness in this suit, made no defense, swore to the loss of the firm's books by fire.

The answer to the above twelve interrogatories, except those to the second, third, fourth and fifth, were traversed, and nine supplemental interrogatories filed.

A motion was then made by plaintiff's attorney that the garnishees show cause why "so much of their answers as set up pleas or defenses for the original defendants, and attacks the judgment under which E.

Hodges v. Graham, Hodges & Co.

J. Hart & Co. have been garnisheed, should not be stricken out as irrelevant and inadmissible." Also to show cause why they should not make full and prompt answers to all interrogatories, original and supplemental, under penalty of having them taken for confessed. This rule was made absolute, so far as to compel the garnishees to answer, had the court *a qua* refused the prayer to strike out, reserving the right to determine whether the answers are relevant or irrelevant.

A motion for a new trial was made upon this order compelling prompt and more explicit answers, which prevailed, and on the twenty-ninth February, 1872, the original rule of twentieth December, 1871, taken by plaintiff to compel answers was dismissed.

From the judgment dismissing this rule this appeal is taken.

The plaintiff invokes the well settled principle of law that garnishees are mere stakeholders, bound to disclose the truth. As to them the question is, are they indebted and can they safely pay? They are not, as garnishees, permitted to interfere between plaintiff and defendant. This doctrine is too well settled to need repetition.

The indebtedness being acknowledged, the garnishee can not be heard to urge any plea to protect the judgment debtor, but where the question of his (the garnishee's) indebtedness is an open one, he can not be deprived of any substantial defense by reason of the form of action selected by the judgment creditor.

In answer to the first interrogatory the garnishees deny any and all indebtedness to the judgment debtors, Graham, Hodges & Co.

In answer to the ninth, they explain how their accounts were closed, allege a settlement acquiesced in by the firm and afterwards a compromise.

To enforce the strict rule invoked by plaintiffs against the garnishees, would deprive them of whatever force there may be in these explanations.

The third person can not be divested of his possession and alleged ownership by the plaintiff, though any process which would deprive him of explanations and defenses allowable in a direct action by the judgment debtor to recover his property.

Judgment affirmed.

Rehearing granted.

ON REHEARING.

LUDELING, C. J. In our former opinion we said: "The indebtedness being acknowledged, the garnishee can not be heard to urge any plea to protect the judgment debtor, but where the question of his (the garnishee's) indebtedness is an open one, he can not be deprived of any substantial defense by reason of the form of action selected by the judgment creditor." After reconsidering this case, we doubt the accuracy of that statement.

The garnishee is a stakeholder, and on his answers the judgment should be for or against him. He has no interest in the contest between the creditor and the debtor. Of course, the falsity of his answers may be shown if he has answered untruly. But, in this case, the object of the motion to strike out part of the answers of the garnishees and of the traverse of the answers is to attack the settlement made between the garnishees and the judgment debtor. The plaintiff "denies the truth of any and all the matters therein set forth by way of plea or defense of the original defendants, or as grounds of attack upon the judgment under which they have been garnished; avers that at the time of service of interrogatories upon them, and now, E. J. Hart & Co., were and are indebted, to Graham, Hodges & Co., in liquidation, in an amount sufficient to satisfy the judgment in this case; denies that there is or was any balance of account due E. J. Hart & Co., by the defendants, and avers that the amounts actually received by E. J. Hart & Co., as proceeds of the whiskies inquired of, were in excess of the special advances spoken of to an amount sufficient, after deducting all lawful commissions and charges, to satisfy the judgment in this case; denies that defendants are or were indebted to E. J. Hart & Co., in any sum on general balance of account, and avers that E. J. Hart & Co. were and are indebted to defendants over and above all debts or liabilities of defendants to them, to an amount sufficient to satisfy the judgment in this case; denies that E. J. Hart & Co. ever accounted to Graham, Hodges & Co. for the proceeds of the whisky inquired of, and avers that the pretended settlement with Charles E. Goodwyn, on the fifteenth of March, 1865, was a fraud on the firm of Graham, Hodges & Co., then in liquidation, and upon the creditors of said firm, and is an absolute nullity of no validity, force or effect in law for any purpose whatever; denies that said pretended settlement was ever acquiesced in by the other members of the firm, or either of them; denies that at the time of said pretended settlement the said Goodwyn was a creditor of his firm in any amount whatever, and avers that W. R. Hodges was a creditor to a considerable amount, while Graham's account was not balanced, though there was nothing to his credit; avers that the consignment of brandies referred to in the answers, as having been settled for by compromise, had been consigned to E. J. Hart & Co. by Graham, Hodges & Co., as agents of Charles Hodges, and that the proceeds actually received therefor by E. J. Hart & Co. were in excess of the special advances thereon to a very large amount; denies the truth of all other statements in said answer not hereinbefore specially admitted, except that it is true as stated in said answers, that it was agreed between Goodwyn and E. J. Hart & Co. that the proceeds of the consignments of whiskies, as well as of the brandies referred to in said answers, and the whiskies and brandies

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remaining on hand on the fifteenth of March, 1865, at a valuation should be credited to the individual indebtedness of Goodwyn to E. J. Hart & Co., instead of being accounted for to his firm; avers that it is not true that the pretended settlement with Goodwyn was *bona fide*, on a fair adjustment of accounts, but that it was at prices very much less than those actually received by E. J. Hart & Co. for the whiskies sold, and at a valuation for the whiskies taken to account much less than the market price at the time; and that this pretended settlement, in addition to its other fraudulent features, was fraudulent also in this, that a large quantity of the whisky is not accounted for at all, as either having been sold or as remaining on hand; denies the truth of all the allegations relative to the compromise of the suit No. 5108 of the United States Circuit Court, except what appears on the face of the paper, it being admitted that the signatures thereto are genuine."

The garnishment process is the mode for making seizures of intangible property. The garnishees say they hold the thing, attempted to be seized, by virtue of a title acquired by a settlement between themselves and their debtor. Suppose the whiskies and brandies, etc., had been actually seized in the possession of the garnishees, and they had shown a title for the whiskies, etc., could that title be attacked collaterally? The seizing creditor can not disregard the title and possession of the garnishees and treat it as a nullity.

The difficulty in this case arises from the attempt of the plaintiff to change his garnishment process into a revocatory action.

This can not be done. 19 An. 16. The grounds on which the plaintiff claims to set aside the transfer or settlement made in 1865, is that the partnership assets were given in payment of an individual debt of one of the partners; that is, an unlawful preference given to the individual creditor over the partnership creditor.

His remedy, we think, is by a direct action.

It is therefore ordered that the decree heretofore rendered remain undisturbed.

No. 3958.

STATE OF LOUISIANA v. WILLIAM H. HARDIN.

Where a bill of exceptions was taken to the ruling of the judge *a quo*, refusing to permit evidence to be offered, on the trial of a motion in arrest of judgment, to prove that one of the jurors was an unnaturalized alien;

Held—That said ruling was correct. Such motions must be based on errors patent on the face of the record. Besides, the juror having been accepted, the defendant could not, after conviction, complain of the want of qualification in the juror.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J.* Criminal case. *James S. Ashton*, District Attorney, for the State. *Leonard & Scott*, for defendant.

State of Louisiana v. Hardin.

LUDELING, C. J. This is an appeal from a judgment sentencing the defendant to imprisonment at hard labor in the penitentiary for the term of one year.

There is only one bill of exceptions in the record. It is taken to the ruling of the judge, refusing to permit evidence to be offered, on the trial of a motion in arrest of judgment, to prove that one of the jurors was an unnaturalized alien. The ruling was correct. Such motions must be based on errors patent on the face of the record. Besides, the juror having been accepted, the defendant could not, after conviction, complain of the want of qualification in the juror.

Judgment affirmed.

No. 4375.

SUCCESSION OF MANETTE DUBREUIL.

In 1860, Manette Dubreuil died. Her estate consisted of the undivided half of a certain real estate, standing in the name of Charles Beebe, deceased. Manette Dubreuil had no legal heirs. Luke Beebe was her natural son, duly acknowledged and recognized as such by a judgment of the Second District Court of the parish of Orleans. In 1870, said Luke Beebe got judgment in his favor against the executor of Charles Beebe, to recover one-half of said property. In 1871, the children of a predeceased natural child of Manette Dubreuil, caused her will to be probated. These grandchildren and Luke Beebe were by said will made universal legatees; and the testatrix further declared that she acknowledged owing her son Luke a certain sum of money he had advanced to her for her benefit, and which she wished to be paid to him, with a certain rate of interest. The grandchildren and universal legatees, who are the contestants in this case against Luke, maintained that the passage of the testament above referred to was only the acknowledgment of a debt and not a legacy, and pleaded prescription;

Held—That it constituted a remunerative legacy; that the succession of Manette Dubreuil was an irregular succession; that representation is not admitted in such successions, except in the case of the succession for a natural child; that until the will of Manette Dubreuil was probated, Luke Beebe was the sole heir of the deceased; that, as such, he had no right to sue the estate, or to make a demand for payment of a debt due to him, as such debts are extinguished by confusion; that when the will was produced and probated, Luke Beebe ceased to be the sole heir; that his right as creditor became exigible, and that until then prescription did not begin to run.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Lea, Finney & Miller*, for appellant. *Charvet, Duplantier and P. Duvigneaud*, for appellees.

LUDELING, C. J. This suit is to effect a partition and settlement of the succession of Manette Dubreuil. An order for the partition was made, referring the parties to a notary, who adjusted the accounts.

He allowed Luke Beebe the following items, to wit: Eight hundred dollars, with eight per cent. per annum interest, from the fifteenth of June, 1871, being the amount mentioned in the will of Manette Dubreuil, in favor of Luke Beebe; one hundred and eighty-six dollars and one hundred and nineteen dollars, debts of the deceased paid by Luke Beebe at her request, sundry sums, expenses of the last illness and of the funeral of the deceased, amounting to seven hundred and

Succession of Manette Dubreuil.

ninety-two dollars and fifty cents, with eight per cent. interest during several years.

On the trial of the rule to homologate this account, the lower court rejected these items, holding that they were prescribed. From this judgment Luke Beebe appealed.

Manette Dubreuil died in 1860. Her estate consisted of an undivided half of certain real estate standing in the name of Charles Beebe, deceased. The property was inventoried as the property of Charles Beebe, and was claimed by his executor and heir.

The only evidence of the right of Manette Dubreuil to any part of the property was parol. Manette Dubreuil had no legal heirs. Luke Beebe is her natural son, duly acknowledged and recognized as such by a judgment of the Second District Court of New Orleans. He instituted suit against the executor of Charles Beebe to recover one-half of the property inventoried as Charles Beebe's, and in 1870 he succeeded in getting a judgment in his favor. The property thus secured is the subject of the present suit.

On the third of June, 1871, the children of a predeceased natural child of Manette Dubreuil caused her will to be probated.

By this will she instituted her two children, Luke and Elizabeth, and the grandchildren of her deceased son, John Dubreuil, to wit: John, Oneseine and Marie Dubreuil, her universal legatees, and she further declared in her will:

“Je reconnais devoir à mon dit fils Luke Beebe la somme de huit cents piastres, pour avances qu'il m'a faites en diverses fois pour me mettre à même de payer, mes banquettes, les taxes sur mes propriétés, mon médecin et les réparations que j'ai eu à faire à mes maisons.

“J'entends et je veux que cette somme lui soit remboursée et payée de suite après mon décès, avec un intérêt sur le pied de huit pour cent par an à partir de ce jour, quinze juin, mil huit cent cinquante-sept, jusqu'au paiement intégral de la dite somme.”

Elizabeth Beebe died before the testatrix, and the children of John Dubreuil are the contestants with Luke Beebe. They have pleaded prescription against the claims of Luke, contending that the passage of the testament above quoted is only an acknowledgment of a debt and not a legacy.

We think it constituted a remunerative legacy. 2 R. 292; 4 R. 397; 13 An. 87; 8 An. 362.

In order to appreciate correctly the question raised by the plea of prescription against the debts due Luke Beebe, it is necessary to understand the status of Luke Beebe and of the children of John Dubreuil.

The succession of Manette Dubreuil was an irregular succession. To such successions the law calls the surviving husband or wife; secondly, the natural children; and lastly, the State. C. C. art. 917.

Representation is not admitted in such successions, except in the case of the succession of a natural child. C. C. 923. So that until the will of Manette Dubreuil was probated, Luke Beebe was the sole heir of the deceased. As such he had no right to sue the estate or to make a demand for payment of a debt due him. Such debts would be extinguished by confusion. When the will was produced and probated, Luke Beebe ceased to be the sole heir, and his right as creditor became exigible. Until then prescription did not begin to run. 11 Rob. 402; 2 La. 451; 13 An. 161; C. C., art. 3537.

It is therefore ordered and adjudged that the judgment of the lower court be so amended as to allow the appellant, in addition to the amounts allowed him by that judgment, the amount of the following items of the statement of accounts in this succession made by J. F. Coffey, notary, dated twenty-ninth of December, 1871, to wit: Item No. 3, \$201; item No. 4, \$150; item No. 5, \$180; item No. 6, \$102 50; item No. 7, \$75; item No. 8, \$30; item No. 9, \$50; item No. 15, \$186 and \$119, one-half thereof, \$152; item No. 12, \$800—with interest at the rate of eight per cent. per annum on this last item, in accordance with the terms of the will, and five per cent. per annum interest on the other items, from the date of the probate of the will; and that the same be paid out of the property belonging to the succession of Manette Dubreuil, in due course of partition; and that as thus amended the judgment of the lower court be affirmed. It is further ordered that the appellees pay costs of appeal.

26	372
46	787

No. 4654.

STATE OF LOUISIANA v. JOHN F. C. WELLS.

Where the exception was to the ruling of the court permitting an indictment to be amended by inserting the value of the mule alleged to have been stolen;

Held—That it was not necessary that the value of the animal should have been set forth in the indictment. The amendment added nothing to the validity of the instrument, nor did it in any manner vitiate it. *Utile per inutile non vitiatur.*

APPEAL from the Eleventh Judicial District Court, parish of Red River. *Trimble, J.* Criminal case. *Robert J. Vaughn*, District Attorney, for the State. *J. E. Paxton, J. C. Brown, L. W. Connolly*, for defendant.

TALIAFERRO, J. The defendant was indicted for stealing a mule. He was found guilty and sentenced to the penitentiary for three years. He has appealed.

The case is presented by a bill of exceptions to the ruling of the court permitting the indictment to be amended by inserting the value of the mule alleged to have been stolen. The stealing a horse, ass or mule is a statutory offense. Revised Statutes, section 814.

“Indictments for statutory offenses must describe the offense in the words of the statute, or words certain and equivalent.” 5 An. 324.

It was not necessary that the value of the animal should have been set forth in the indictment. The amendment added nothing to the validity of the instrument, nor did it in any manner vitiate it. *Utile per inutile non vitiatur.*

Judgment affirmed.

No. 2776.

JOHN HALLIDAY v. A. LANATA.

Where the judge of the District Court was of opinion that the verdict of the jury was in direct and flagrant violation of law and evidence, and in utter disregard of his charge, he should have set the verdict aside and granted a new trial, as asked for.

It is impossible to sanction the practice, become too common, that an inferior judge should sign a judgment which he believes and avers to be wrong, in the hope that this court will set it aside.

Where counsel for appellee complained that, before this court should have set aside the verdict of the jury and remanded the case, it should have decided that their finding was erroneous;

Held—That there was force in this criticism of the decree, and that a rehearing should be granted as prayed for.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J.* Trial by jury. *Fellows and Mills*, for plaintiff and appellee. *Roselius and Philips*, for defendant and appellant.

MORGAN, J. In the record we find the following extract from the minutes of the lower court :

“Alfred Philips, Esq., of counsel for defendant, moved the court that said defendant be allowed the following order, to wit:

“On motion of C. Roselius and Alfred Philips, of counsel for defendant, it is ordered, that plaintiff do show cause, on ——— next, the ——— instant, at ten A. M., why a new trial should not be granted herein, on the grounds filed.

“Whereupon, the court, for oral reasons assigned, considering the verdict of the jury to be in violation of law and the evidence, and in direct and flagrant violation of the charge of the court to the jury, and for the purpose of expediting justice by appeal to the Supreme Court;

“Ordered, that said motion be overruled, and the new trial asked for be refused.”

If the judge of the district court was of the opinion that the verdict of the jury was, as he says it is, in direct and flagrant violation of law and the evidence, and in utter disregard of his charge, he should have set the verdict aside, and granted a new trial. A different jury might render a verdict in accordance with law and equity, and which may be satisfactory to both parties. It is as much the province of the district courts to set aside the verdict of a jury when contrary to law, as it is

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ours; and we can not sanction the practice, become too common, that an inferior judge should sign a judgment which he believes, and avers, to be wrong, in the hope that we will set it aside. It is as much his duty to see justice done between the parties litigating their rights before him, as it is ours. Why he should render a judgment which he knows to be wrong, any more than we should, we are at a loss to imagine.

It is, therefore, ordered, adjudged and decreed, that the verdict of the jury herein rendered, be set aside; that the judgment of the lower court be avoided and reversed, and that the case be remanded to the lower court, to be proceeded in according to law; appellee to pay costs of appeal.

ON REHEARING.

MORGAN, J. When this case was submitted to us some time ago we remanded it, upon the ground that the judge *a quo*, although he signed the judgment, declared the verdict of the jury upon which it was rendered in direct violation of the law, and against his charge. Counsel for appellee complained that before we set aside the verdict of the jury, we should have declared that their finding was erroneous. We thought there was force in this criticism upon our decree, and granted the rehearing prayed for. We now embark upon the labor which it is our duty to perform, and shall proceed to dispose of the case upon its merits.

Plaintiff alleges that in July, 1869, Lanata, under an order of attachment, seized upon his marble and granite works, situated at the corner of Girod and St. Charles streets, taking corporeal possession of the same, and of all the stocks, implements and chattels therein contained; that this order of attachment was procured by Lanata's making oath that petitioner was about to convert his property into money, so as to place it beyond his reach, and that he was his creditor for \$604 15, adding that "he had been credibly informed and verily believed that Holliday had, since the maturity of the note sued on, declared that it was his intention to sell out his establishment and leave the country." He avers that at the time of making these charges, Lanata was well aware that they were utterly devoid of foundation, and that on the contrary plaintiff was on the eve of extending his business, by opening a most valuable quarry of marble in the State of Alabama, the product of which, when once known in this market, would almost completely supersede that imported from Italy, inasmuch as the same quality of native marble could be sold at a profit for half the price of the foreign; that he had, without the slightest reserve, communicated his project to Lanata, and had even submitted to him samples of the

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several qualities of marble produced by the quarry which he proposed to exploit, and that it was not for the purpose of securing the claim against petitioner which caused Lanata to take out his writ of attachment, but that it was obtained in order to preserve and maintain his valuable monopoly of the importation of Italian marble by crushing the rival enterprise of the petitioner; that upon a rule to set aside the attachment, the malice and bad faith of Lanata were made fully apparent, and the order was accordingly rescinded; that by the false and calumnious charges made under the sanction of his oath, and at the peril of pecuniary responsibility, Lanata has so far succeeded in shaking the credit of petitioner as to compel him to suspend his business, dismiss his workmen, and has involved him in the greatest embarrassment for the fulfillment of his various contracts; that the direct and immediate damage to him, so far as he had ascertained when he filed his petition, was \$7000, and he avers that as indemnity to his credit and standing, eventual loss of profits and of time, annoyance and expenses of litigation, the further sum of \$15,000. He asks for a judgment for \$22,000.

The defendant filed a general denial.

There was a verdict and judgment for the plaintiff for seven thousand dollars; and the defendant has appealed. The plaintiff has not asked that it be amended in his favor.

There is no doubt that Halliday owed Lanata \$607 35. To the petition filed against him, in which this sum was claimed, he made no answer, and judgment by default thereon was rendered and confirmed against him, and there is no evidence in the record that this judgment has ever been paid. But the record does contain the sheriff's return upon the *fi. fa.* issued thereon, which is in the following words: "Received, December 4, 1869. Nothing realized after due demand made of defendant, who answered, no money, no property."

Lanata's suit was filed on the thirtieth of July, 1869. The writ of attachment was issued on the same day, and on the second of August the contents of the marble yard, corner of St. Charles and Delord streets, were seized by the sheriff; on the twelfth of August they were released, defendant having given bond; and on the twenty-first of August the attachment was set aside by the court from which it issued.

The note upon which the suit was brought was dated the eleventh of March, 1869, payable thirty days after date. The petition was filed on the thirtieth of July.

The plaintiff has been living in this city twenty-three years, and, at the time the attachment was sued out was engaged in working marble, granite and stone of all description. The attachment of his property, he says, completely broke him up in business, and caused him immediate damage in the sum of eight thousand dollars, loss of profit,

which he would have made on several pieces of work which he had on hand, and which he was unable to complete.

He was the owner, as he says, of four hundred acres of land in Taledega county, Alabama, upon which there is a marble bed, elevated out of the valley about two hundred and seventy feet, a solid mass of marble, extending down the valley one mile, "and is about half a mile wide before it pitches in the mountain on the other side." He considers it a much finer quality of marble than the Italian, as it is, according to Professor Tournay, of Alabama, pure carbonate of lime, which constitutes the finest quality of marble; it contains only one trace of silica, while there are several traces of silica in the Italian marble. There are several kinds of marble in the bed; blue, black, green and white. The black is fully equal to the Irish marble, and the green is equal to the marble called verd-antique, and takes as fine a polish. There is also a quarry of common flag stones in the same tract. His intention was to supply the city with marble and building material, and to aid in this purpose he was (when testifying in this suit, twenty-eighth of January, 1870) having a tow-boat and barges prepared to fetch the marble here. His chief depot was to be at the New Basin. He was to have, besides, a depot in New York, and one in St. Louis. The marble, he says, could be sold for thirty per cent. less than the Italian marble. Flags, coming from New York, would cost about \$3 50 a yard, while those from his quarry would cost about fifty cents a yard. He was offered, he says, \$70,000 by capitalists in New York, for a half interest in his quarry, or, rather, they offered to put in that amount to work the quarry; but whether or not he accepted this proposition does not appear. It is probable, however, that he did not accept so low a price for his property, as, estimating what quantity of marble might be produced from it, he says: "I believe the marble business in Vermont amounts to \$3,000,000 per annum; and these quarries are more extensive and more easily worked, because it is a surface quarry, and the others have to go down seven hundred feet to get the marble, and to mine underneath the earth." He would not have been apt to have sold the half of so large a property for so insignificant a sum as \$70,000.

Now, Lanata was also in the marble business. He knew of the plaintiff's quarry; he was informed of his intentions regarding it; and, according to the plaintiff, it was to get rid of so formidable a rival, that he instituted these attachment proceedings against him, which, as he says, completely broke him up.

If this be true; if Lanata caused him this great damage; if the attachment of his property was made without just cause and without the authority of law, Lanata was wrong, and the damage he has caused he must repair.

We can not agree with the plaintiff as to the damages he alleges he

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has sustained. He claims that when the attachment issued he had contracts on hand which would have netted him \$8000. The contracts he has positively sworn to are, first, one with Willoz to build a tomb for \$5200; second, one with the Ladies' Benevolent Association for \$3200. He says he had others for mantels, etc., for various parties in this city, and some work for persons living in Mississippi, but with the exception of the partner of a Mr. Salter, he gives neither names nor amounts of his contracts, and he does not say how much this party was to pay him. The contracts which he has established amount to \$8400. To enable him to earn \$8000 on them they would have been almost all profit. The contract with Willoz was in the winter of 1868, and was to be finished in three or four months. He purchased the material in New York, on a letter of credit from Davidson—except about \$800—who was his associate in the matter, and when the materials were shipped they drew drafts for the price thereof on Davidson. Portions of the work were to be paid for as the work progressed. Being asked how much he has received on account of this work, he says he does not recollect; being asked how much is due on account of the work he says he does not recollect; says he does not know whether he will be paid anything or not; that he is entirely at his mercy, as the contract has expired. Being asked when it expired, he says he does not recollect; says he thinks the work was to be completed by "All Saints' Day," but being pressed with the question, "the contract had expired, then, previous to August, 1869?" he answers "yes." Now, as Lanata's attachment was only levied on the second August, it necessarily follows that he did not lose anything on that contract by reason of Lanata's attachment. Besides, he testifies that the work was going on under his direction when the suit was being tried. With regard to the contract with the Ladies' Benevolent Association, he says he should have made a profit of \$1500. The total he was to have received for the entire work was \$3000 or \$3290. Being asked how much he had received on account of this work, he answers, "\$500 is all I received." But he says that he gave Davidson orders for money on this contract. Being asked how much Davidson received, he says he does not know, but he thinks he received something like \$2000. If the contract, then, was for \$3290, \$900 remained due on it.

Then he had a flight of steps to make for a lady who lives somewhere in the neighborhood of Carrollton. But where she lived exactly he could not tell; neither did he know her name, nor whether she was married or single; nor does he say what he was to receive for the work, nor that it was ever commenced. Being asked what became of the steps, he says the stone is "laying around the yard; laying out in the burying ground." Being asked what the material was doing in

the burying ground, he says part of it was attached to some of the other material to build a tomb with, from which it had to be split off; that it was never hauled away; and that he never did any work on the steps. It is difficult for us to see how Lanata's attachment could have interfered with the profits which he expected to realize from this work.

It seems that he had another contract with one Roberts for \$1650. But this contract was entered into in 1868. The work is not finished. At first he does not recollect when he commenced it; thinks it was commenced about eighteenth June, 1868; some of it was done while he was in partnership with Robertson. He continued to work "until all the stuff he had on hand was used up." Then, he says, he could not continue the work because he could not get means to pay the hands. Being asked how much money he had received on this contract, he doesn't recollect; nor does he recollect when the first payment was made. We do not see that Lanata's attachment caused the damage he complains of here, if he was damaged at all. Neither do we see how he could have suffered the damage he claims by reason of the taking possession by the sheriff of the property which he claims he was deprived of. He says all his property in the yard was attached. Being asked what that property consisted of, he says: "Blocks of marble, and one thing or another." But he can not tell how many, or what they were worth. Being asked how much property of his own was attached, he says he doesn't recollect. Asked whether it was worth \$100, he says he can not tell without going into a measurement.

But his main cause of complaint is that the attachment prevented him from raising any money to carry on his business. We find another reason for it; it is that he did not pay his debts. If he had paid Lanata what he owed him, his credit would not have been impaired. It was the suit, not the attachment, which was a mere accessory to it, which injured him. Besides, he testifies that he kept the knowledge of the attachment from the men in his yard, and that they were not prevented from working by it. If his work went on, without regard to the attachment, we do not see how the attachment injured him.

All these facts we have taken from the testimony of the plaintiff, and we do not see from his own story of his wrongs that Lanata has caused him any damage, and we agree with the district judge that the verdict which gave him seven thousand dollars, was neither sanctioned by the evidence or authorized by the law.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed; and it is further ordered that there be judgment in favor of defendant with costs in both courts.

Phelan et als. v. Ax.

No. 2930.

DANIEL PHELAN et als. v. CHARLES AX.

25	379
52	1173

Where the plaintiffs claimed one-half of a certain lot of ground as heirs to their deceased mother, who had an undivided community of interest in said lot, now in possession of defendant;

Held—That plaintiffs had no cause of action, inasmuch as it was not shown that the community between the plaintiffs' father and mother had been settled, nor that anything remained after paying the debts thereof, nor that plaintiffs had been put in possession of their mother's estate.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Breaux & Fenner*, for plaintiffs and appellants. *E. J. Wenck*, for defendant and appellee. *T. A. Bartlette, L. Castera* and *C. Hunt*, for warrantors.

HOWELL, J. The plaintiffs, children of William Phelan, claim as heirs of their mother the undivided half of a lot of ground in the possession of defendant, who holds under title by mesne conveyances from their father. The several vendors are called in warranty.

It appears that William Phelan first acquired the property in May 1852. In March 1858, he sold it for cash to one T. Lafon, with the right of redemption for one year. In April 1859, Lafon resold to Phelan for a small cash payment, and the balance in a note for \$1500 at one year with eight per cent. interest, and secured by mortgage and vendor's privilege. In September 1859 Mrs. Phelan died, and in March 1861 her succession was opened by the surviving husband, the inventory showing no property except that now in controversy, which was appraised at \$3500. In April following, William Phelan surrendered his property to his creditors, his schedule showing debts exceeding \$5500 and assets consisting of this property valued at \$3500 and a few hundred dollars of personal rights. The interest of his minor children in the said lot was suggested. T. Lafon was appointed syndic; but the property was not sold until May, 1865, when P. Halpin purchased it at sheriff's sale for \$2440, and in December following he sold it to the defendant.

In March, 1861, William Phelan filed a petition in the Second District Court, setting out community debts to about \$3000, alleging the necessity of selling said property to pay them, and praying for a family meeting to fix the terms of sale; and in February, 1862, upon the advice of a family meeting, he was authorized by the said court as tutor to sue for a partition of said property, and suit was instituted for the purpose against the syndic, but not prosecuted.

The defendant and the warrantors excepted that the petition shows no cause of action, in that it is not shown that the community between plaintiffs' father and mother has been settled, nor that any thing remained after paying the debts thereof, nor that plaintiffs have been put in possession of their mother's estate. Answers were filed, setting up

general and special defenses, and the exceptions were referred to the trial on the merits. After hearing evidence the court *a qua* maintained the exception that plaintiffs have no cause of action, because they have not shown that the community between their father and mother has been settled.

This, as a defense, seems to be sustained by the authority of *Lawson v. Ripley*, 17 La. 247, where it was held that the representatives of a deceased wife, although their distinct interest to the community attaches at the dissolution of the marriage, subject to their right to renounce and to be exonerated from the payment of the community debts, have nothing to claim out of the acquets and gains, until such debts are paid or liquidated. See also 1 R. 378; 7 R. 404; 2 An. 30.

We do not think the authorities relied on by the plaintiffs establish a different doctrine or maintain their right of action under the circumstances of this case.

Judgment affirmed.

No. 3019.

H. C. MILLAUDON v. MRS. WIDOW CARSON.

Where a suit was brought against a wife after her husband's death, on a promissory note made by said wife and her husband *in solido*, and secured by a mortgage on property standing in the name of the wife, but purchased during the existence of the community; Held—That she could not bind herself with her husband by borrowing money to pay for said community property.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J.* Trial by jury. *John S. Tully*, for plaintiff and appellee. *James Graham* and *W. B. Hyman*, for defendant and appellant.

LUDELING, C. J. This is a suit on a promissory note made by the defendant and her husband *in solido*, and secured by a mortgage on property standing in the name of the wife, but purchased during the existence of the community.

The husband had died when this suit was instituted; the wife alone was sued, and there was judgment against her personally for the amount of the note and recognizing the mortgage. This note was a community debt. It was proved that the amount for which judgment was rendered against her had been used in paying the price due on the purchase of the property aforesaid, and it is therefore contended that the debt inured to her separate benefit. This is not correct.

The property purchased during the marriage was community, and she could not bind herself with her husband by borrowing money to pay for it.

It is therefore ordered and adjudged that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendant with costs in both courts.

State ex rel. Caballero v. Judge of the Second District Court, parish of Orleans.

No. 4681.

STATE ex rel. JOSE M. CABALLERO v. JUDGE OF THE SECOND DISTRICT COURT, PARISH OF ORLEANS.

A writ of prohibition will only be issued in aid of the appellate jurisdiction of this court. It is not necessary, where, on the judgment being rendered in the court below, the case can be brought before this court for review, and the question of jurisdiction be decided.

APPPLICATION for a writ of prohibition, to be issued to *A. L. Tissot*, judge of the Second District Court, parish of Orleans. *George L. Bright*, for the application on behalf of Mrs. Conte.

LUDELING, C. J. This is an application for a writ of prohibition against the judge of the Second District Court of the parish of Orleans, on the ground that the court is without jurisdiction to try the case. We have heretofore frequently said, that this writ will only be issued in aid of our appellate jurisdiction. The writ is not necessary in this case. When the judgment shall have been rendered in the case, it can be brought before this court for review, and the question of jurisdiction can then be decided.

It is therefore ordered that the application for the writ be refused, with costs against the relator.

No. 4344.

STATE OF LOUISIANA v. EDWARD KELLY, *alias* JACK TOBY.

The statute of Louisiana authorizing prosecutions by the District Attorney on information is not in conflict with the fifth amendment to the constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury." The restriction by this amendment has no application to State courts.

Where the accused, on his being brought to the bar in the custody of the sheriff, is ready for his trial, it is to be presumed that if he has no counsel and does not ask the court to assign him one, he chooses to be heard in his own defense.

The fact that, on his application for a new trial, he stated that he was without counsel and was thus unable to defend himself, is no reason why this court should reverse the judgment which was based upon the verdict of a jury.

When the offense with which the prisoner was charged consisted in his having entered a vessel in the day time with intent to steal, it was not necessary that the information should have recited and described the precise article which he intended to steal. It is sufficient if the indictment is drawn up in accordance with the statute on this subject. R. S. section 854.

APPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *Edward Kelly, in propria persona*, appellant. *Simeon Belden*, Attorney General, for the State.

MORGAN, J. The defendant has appealed from the judgment of the district court, which sentences him to three years' imprisonment at hard labor in the penitentiary, he having been found guilty of entering a vessel, in the day time, with intent to steal. The proceedings against him were by information of the district attorney. The counsel ap-

25b	381
45	929

25b	381
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25b	381
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Case 2	
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pointed by this court, at his request, assigns for error to appellant's prejudice, and apparent upon the record:

First—That the constitution of the United States (fifth amendment) provides that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury, and he contends that inasmuch as he has been convicted of an infamous crime, under the sixth act of the State constitution, which provides that prosecutions shall be by indictment or information, and the 977th article of the Revised Statutes, which provides that prosecutions for offenses not capital may be by information, with the consent of the court first obtained, the proceeding was in violation of the third article of the constitution of the United States above referred to, and, consequently, that his conviction was unlawful.

This objection has been settled by former adjudications of this court. In the case of the *State v. Jackson et al.* we held that the statute of the State of Louisiana authorizing prosecutions by the district attorney on information is not in conflict with the fifth amendment to the constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury." The restriction by this amendment to the constitution of the United States has no application to State courts. 21 An. 574.

Second—The second error he assigns is that when the appellant was arraigned and plead not guilty, he was not asked by the court whether he was provided with counsel, and although notified of the fact, in the motion for a new trial, that he was unable to make his defense by counsel learned in the law, the court even then assigned him no counsel to undertake his defense.

The sixth article of the constitution of the State secures to every person charged with crime the right of being heard by himself or counsel. But we do not understand that counsel can be forced upon him. He has the right to be heard by himself, and inasmuch as when brought to the bar in the custody of the sheriff, as appears from the record, he was ready for his trial, we must presume that if he had no counsel, and did not ask the court to assign him one, he chose to be heard in his own defense. The fact that in his application for a new trial he stated that he was without counsel, and was thus unable to defend himself, is no reason why this court should reverse the judgment which was based upon the verdict of a jury.

Third—The third error assigned is that the information does not recite when, where or what the accused intended to steal; and that, as the act charged against him is criminal only from the intent, the intention should have been stated in the information specifically, as essential to and involving the very existence of the crime.

State of Louisiana v. Kelly, alias Toby.

The offense consists in the prisoner having entered a vessel in the daytime with intent to steal, and the indictment is drawn up in accordance with the statute upon this subject. R. S., sec. 854. The law does not say that the precise article which he intended to steal shall be described. Indeed, this would be impossible. The punishment is for the commission of the offense. This is a question of fact, and whether or no the evidence justifies the finding of the jury we are precluded from considering.

Judgment affirmed.

No. 2914.

OLYMPE DE LA GRANGE v. SOUTHWESTERN TELEGRAPH COMPANY.

Where the action is to make a telegraph company responsible for loss on goods, resulting from error in a telegraphic message, the prescription of one year does not apply. This action arises *ex contractu*, and not *ex delicto*.

Where it is contended that the defendants are not the first carrier or contractor, and that it is not proved that the error in the transmission occurred on defendants' line, on whose printed blanks there is express provision for non-liability for the default of other companies;

Held—That, whether first carrier, or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary.

Defendants were engaged in the business of transmitting messages to and from various points in the country, and found it to their interest, if not a necessity, to effect such mutual arrangements with other companies, without any consultation with the parties who might use the telegraph. It was in their power to show that the message delivered by them to plaintiff was precisely the same one received by them from another line, and thus throw the responsibility upon the other company, in case it should be held to be a correct legal principle, that one of two or more connecting companies may thus be relieved from liability.

The proposition that the defendants are liable, if at all, only in case the message is repeated as contained in the printed conditions, can be invoked only against the sender of the message, if against any. The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such condition before delivery.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. W. H. Hunt*, for plaintiff and appellee. *Semmes & Mott*, for defendants and appellants.

HOWELL, J. This is an action to make the Southwestern Telegraph Company responsible for loss on goods, resulting from error in a telegraphic message.

The material facts are, that a Mrs. Tayloe, at Demopolis, Alabama, telegraphed to plaintiff, in New Orleans, to send to her immediately, by express, to *Macon* Station, Alabama, certain valuable goods, which were needed on a particular day. The dispatch delivered by defendants directed the goods to be sent to *Marion* Station, Alabama, and in consequence were never received by Mrs. Tayloe, but after some months they were returned by the express company and tendered to plaintiff, at whose instance they were examined by experts, and the

damage fixed at \$1250, for which she obtained judgment, and the defendants appealed. It appears that a different and distinct company transmitted the message from Demopolis, Alabama, to Meridian, Mississippi, whence the defendant company forwarded it to New Orleans, and delivered it to the plaintiff.

The first question is as to the prescription of one year, interposed by defendants.

The action, in our opinion, arises *ex contractu* and not *ex delicto*. The defendants hold themselves out to the public as being ready to transmit for hire messages for individuals and to deliver faithfully to others such messages as are intrusted to them. They make themselves the agents of both the sender and receiver, and their failure in their assumed duties creates an obligation in favor of the one who may be thereby injured. See 35 Penn. R. 298. It may and often does occur that the party to whom the message is addressed is the only one whose interests are involved, and who is to pay the fee. In such case he is the one in reality with whom the contract is made.

The prescription of one year does not apply.

It is next contended that the plaintiff by her negligence has contributed to the injury complained of and can not recover.

The evidence does not sustain this defense. The plaintiff sent the goods in accordance with the instructions received by her, and there was nothing to suggest to her any error or to impose on her the obligation to provide against the mistake or negligence of the defendants. The goods passed from her control, and before they were put within her reach, the damage was incurred without her fault or agency.

It is contended further, that the defendant is not the first carrier or contractor, and it is not proved that the error in the transmission occurred on defendants' line from Meridian to New Orleans, and being delivered on their printed blanks, there is express provision for non-liability for the default of other companies.

It seems clear to us that whether first carrier or not, it was peculiarly within the power, and was the duty of the defendants to make the proof here suggested, if necessary. They were engaged in the business of transmitting messages to and from various points in the country, and found it to their interest, if not a necessity, to effect such mutual arrangements with other companies as would enable them to successfully conduct such business, and this without any consultation with the parties who might use the telegraph. It was in their power to show that the message delivered by them to plaintiff was precisely the one received by them at Meridian, and thus throw the responsibility upon the other company, if it be a correct legal principle, that one of two or more connecting companies may thus be relieved from liability, a question which it is unnecessary now to decide.

Olympe de la Grange v. Southwestern Telegraph Company.

The proposition that the defendants are liable, if at all, only in case the message is repeated as contained in the printed conditions, can be invoked only against the sender of the message, if against any; for it is his message, his language that is to be transmitted, and it is only known to the receiver when delivered and as delivered. He is to be guided or informed by what is delivered to him, and he has no opportunity to agree upon any such condition before delivery.

The plaintiff sent her goods according to the directions contained in the telegram delivered to her by the defendants, and by their fault, or that of those for whom and with whom they were bound, she lost the sale of them, and a loss by depreciation in value was the consequence. For this we think the defendants are directly responsible.

Judgment affirmed.

Rehearing refused.

No. 4668.

O. L. BLANCHARD v. MAXIMILIAN KENISON.

Where the claim of plaintiff was for about \$478, principal and interest, at the institution of the suit, and was alleged to be the hire paid in advance, under a charter party, for a steamboat, which was lost; and where the defendant reconvened, claiming \$10,200; the value of the boat;

Held—That the motion to dismiss the appeal for want of jurisdiction, must prevail. The real matter in dispute is less than \$500. The charter party is not the matter in dispute. The demand, it is true, grows out of the charter party, but it is simply to recover back a certain sum paid under the provisions of the charter party; and the right to recover back, as alleged, springs from a cause outside of the charter party, and the existence, or validity, or the enforcement, of the charter party, is not involved in plaintiff's demand.

Besides, no appeal has been taken in relation to the reconventional demand.

A PPEAL from the Fourth District Court, parish of Orleans. *Lynch, J. Bentinck Egan*, for plaintiff and appellee. *Randolph, Singleton & Browne*, for defendant and appellant.

HOWELL, J. A motion is made to dismiss this appeal, for want of jurisdiction.

The claim of plaintiff and appellee is for about \$478, principal and interest, at the institution of suit, and is alleged to be the hire, paid in advance, under a charter party, for a steamboat, which was lost. The defendant reconvened, claiming \$10,200, the value of the boat. Judgment was rendered in favor of plaintiff, for the sum claimed, and dismissing the demand in reconvention. The defendant was allowed a suspensive appeal from said judgment, upon giving bond, as required by law. He gave bond for \$850.

The motion must prevail. The matter in dispute on the principal demand is less than \$500, and we have no jurisdiction of it. The appellant errs in saying the charter party is the matter in dispute. The demand, it is true, grows out of the charter party, but it is simply

 Blanchard v. Kenison.

to recover back a certain sum paid under the provisions of the charter party; and the right to recover back, as alleged, springs from a cause outside of the charter party; and the existence or validity, or the enforcement of the charter party is not involved in plaintiff's demand.

Nor can we maintain the appeal as to the reconventional demand, as no appeal seems to have been taken therefrom.

It is therefore ordered that the appeal be dismissed, with costs.

Rehearing refused.

 No. 3452.

JEAN ANTOINE ESCOTT et als. v. CITY OF NEW ORLEANS.

All the questions in this suit were passed upon and settled in the case of the heirs of Escott v. Municipality No. 2.

APPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Lacey, Butler & Lavisson*, for plaintiffs and appellants. *H. D. Ogden*, for defendant and appellee. *Randell Hunt*, for the heirs of Livingston, called in warranty.

MORGAN, J. We agree with the judge of the district court, that all the questions in this controversy have been passed upon, and are settled by the decision of this court in the case of the heirs of Escott v. Municipality No. 2.

The judgment of the district court is, therefore, affirmed, with costs. Rehearing refused.

 No. 4331.

THE STATE v. HENRY PETRIE.

Until the jury box is exhausted the jury may be drawn therefrom, even though fifteen months have elapsed since the list of jurors was furnished by the sheriff. The form of indictment is sufficient where it fully apprises the accused of the crime with which he is charged.

APPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *C. H. Luzenberg*, District Attorney, for the State. *James O. Walker*, for appellant.

WYLY, J. The defendant appeals from the judgment under which he was sentenced to the penitentiary during the term of his natural life, said judgment being on an indictment for breaking and entering a dwelling house in the night time with intent to steal, and committing an actual assault upon a person lawfully in such house.

Until the box is exhausted the jury may be drawn therefrom, even though fifteen months have elapsed since the list of jurors was furnished by the sheriff. The challenge to the array was therefore properly overruled.

The State v. Petrie.

The form of the indictment was sufficient. It fully apprised the accused of the crime of which he was charged. Revised Statutes, section 850.

There are other objections in the assignment of errors; but they are not of a serious character. The appeal seems to have been taken for delay.

Judgment affirmed.

Rehearing refused.

No. 2891.

MECHANICS' AND TRADERS' BANK v. UNION BANK.

25	387
45	651
25	387
52	921

As a sovereign, the United States is bound by the limitations of the federal constitution, and, of course, it can not appoint a judge to a State court, much less create a State court and appoint the judge to administer it.

The President, representing the United States in the exercise of its sovereign powers, could not create a court to decide any civil controversy.

This could only be done by Congress under the limitations of the constitution.

But, in the exercise of war powers, the United States is not restrained by the limitations which the constitution imposes on it as sovereign.

Its business as a warrior is to conquer, to restore peace and to maintain the government, and it can use any means necessary to the end, regardless of all restraints, except the law of nations.

When the United States captured the city of New Orleans in 1862, the civil government, existing under the Confederacy, ceased to have authority. As an incident of war powers, the President had the right to establish civil government, to create courts to protect the lives and the property of the people.

The General commanding the military forces of the United States which captured the city, had the right to establish the provisional court called the Provost Court, which rendered the judgment against the plaintiff in this case. That court had authority, temporarily, to decide all civil causes.

The plaintiff, who paid under protest a judgment rendered by a competent court, established by the United States in the exercise of its war powers after the capture of New Orleans, has no cause of action against its judgment creditor for the money paid in pursuance of the decree of that court, and that judgment is validated by article 149 of the constitution of this State.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Randolph, Singleton & Browne* and *T. H. Kennedy*, for plaintiff and appellant. *Lea, Finney & Miller*, for defendant and appellee.

WYLY, J. The plaintiff sues to recover \$130,000 which it paid to the defendant under a judgment of the Provost Court established by General Butler, in this city, in May, 1862.

The payment was made under the following protest:

“Union Bank v. Mechanics' and Traders' Bank.—Provost Court.—
The Mechanics and Traders' Bank having been condemned by judgment of this court to pay to plaintiff \$130,000 in currency, and being thus compelled to pay said amount of said judgment, the said bank pays the same under the protest that the said judgment is illegal and void, because the court had no jurisdiction of the case.

(Signed)

WALTER G. ROBINSON.

Attest: J. E. BERNARD.”

"The money was paid in my presence under the above protest.

(Signed)

J. M. BELL, Provost Judge.

July 24, 1862."

The important question is: Was the judgment which the plaintiff was compelled to pay an absolute nullity, and can he recover from the defendant the amount paid by reason of said judgment?

This raises the question whether General Butler had the right after the capture of the city, in May, 1862, to appoint a judge to try civil cases. If he had this right, the judgment was not an absolute nullity, and the amount paid by the plaintiff can not be recovered.

If the judge had the right to hear and determine the case, the plaintiff can not recover the money paid in satisfaction thereof, even though it be conceded that there was not sufficient proof to authorize the judgment, or that the debt was for confederate money.

As a sovereign the United States is bound by the limitations of the constitution, and, of course, it can not appoint a judge to a State court, much less create a State court and appoint the judge to administer it.

The President representing the United States, in the exercise of its sovereign powers, could not create a court to decide any civil controversy. This could only be done by Congress under the limitations of the constitution. But in the exercise of war powers, the United States is not restrained by the limitations which the constitution imposes on it as a sovereign. Its business, as a warrior, is to conquer, to restore peace, and to maintain the government; and it can use any means necessary to that end, regardless of all restraints, except the law of nations.

Under the constitution the United States has the right to make war, to raise and support armies and navies, to suppress insurrections and repel invasions. The measures to be taken in carrying on war and to suppress insurrections are not defined; and the decision of all such questions is in the discretion of the government to whom these powers are confided by the constitution.

When the United States captured the city of New Orleans in 1862, the civil government existing under the Confederacy ceased to have authority. As an incident of war powers the President had the right to establish civil government, to create courts to protect the lives and the property of the people. This was expressly decided in the case of the Grapeshot, 9 Wallace 129.

The question is, had the general commanding the military forces of the United States which captured the city the right to establish the provisional court, called the Provost Court, which rendered the judgment against the plaintiff? We are of the opinion that he had. This was an exercise of the war powers of the United States, presumably with the consent and authorization of the President, the com-

Mechanics' and Traders' Bank v. Union Bank.

mander-in-chief; and of the propriety of the exercise of these powers we are not the judges. The decision of all such questions rests wholly with those to whom the war powers were confided by the constitution. Finding no limitation in the constitution upon the exercise of war powers by the Congress and the President, this court can not decide that the President was without authority to confer the power upon General Butler, which he presumably did, to establish the Provost Court and to appoint Judge Bell, with authority, temporarily, to decide all civil causes, including the one now complained of.

In New Mexico during the war, General Kearny, commanding the military forces of the United States, organized a provisional government, and not only established inferior and superior courts, but also ordained a code of laws; and the Supreme Court of the United States recognized and sustained his right to do so. See the case of *Leiten-dorfer v. Webb*, 20 Howard 176; also *Cross v. Harrison*, 16 Howard 164; *Burke v. Fregre*, 22 An. 629; and *Lanfear v. Mestier*, 18 An. 497; also *Wilcox v. Jackson*, 13 Peters 498.

The plaintiff, therefore, who paid a judgment rendered by a competent court, established by the United States in the exercise of its war powers, the only authority competent to organize a court in this city at the time, has no cause of action against its judgment creditor, the defendant, for the money paid in pursuance of the decree of that court. The United States had authority to establish this court; and the judgment is validated by article 149 of the constitution of this State.

It is therefore ordered that the judgment herein in favor of the defendant be affirmed with costs.

Rehearing refused.

Writ of error to the United States Supreme Court granted by Justice Bradley and filed on the twenty-fourth of September.

No. 4607.

CITY OF NEW ORLEANS v. MECHANICS AND TRADERS' INSURANCE COMPANY.

The syllabus in the following case, the city of New Orleans v. Crescent Mutual Insurance Company, No. 4485, is applicable to the present one; the two cases being identical.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J.* *George S. Lacey*, City Attorney, for plaintiff and appellee. *E. W. Huntington* and *J. Livingston*, for defendants and appellants.

MORGAN, J. This case is identical with the case of the same plaintiff v. the Crescent Mutual Insurance Company.

For the reasons therein assigned, it is ordered, adjudged and decreed that the judgment appealed from be affirmed, with costs.

Rehearing refused.

No. 4485.

CITY OF NEW ORLEANS v. CRESCENT MUTUAL INSURANCE COMPANY.

There is no law which requires that the tax bills or receipts shall be signed by the Administrator of Finance of the city of New Orleans, or that stamps should be affixed to them. It is not necessary that, in the judgment enforcing the payment of the tax bills, there should be specifications separating the amount assessed on real estate from the assessment on merchandise, capital and money at interest. It is sufficient that this should be done in the tax bills on which the judgment is predicated.

It was a sufficient publication, and such as was required by the law, where it was proved that the notices to taxpayers were published at least four times in the New Orleans Republican, to wit: on the twenty-second, twenty-seventh and thirtieth of August, and on the nineteenth of September, 1872. It was not necessary that there should have been further evidence of the ordinances, Nos. 1497 and 1498, than there is in the record.

The offering in evidence of the several papers in which the notice of publication was made, and the subsequent filing of them, was sufficient to establish what the law required.

The default taken on the fifth of November, 1872, and confirmed on the twentieth of same month, was in conformity with law.

The law relating to city taxes does not require the notices to be published for thirty days. It only declares that no judgment shall be rendered until after thirty days' notice, the notice to be thrice published.

The return of the service of judgment by the sheriff was not vitiated by his calling it in said return a *writ* of judgment, nor was it indispensably necessary that the copy of the judgment should have contained the signature of the judge; nor was it sacramental that the clerk should have mentioned that the judge had signed the judgment. All that was required was notice of the judgment, and the certificate of the clerk that the judgment was rendered was sufficient.

The city ordinances Nos. 1261, 1262, 1272 of December, 1871, do not make the aggregate taxation exceed two per cent., and this objection, so far as these ordinances are concerned, can not be maintained.

An ordinance of the City Council of New Orleans can not be questioned with regard to its being in contravention of an article of the constitution. The question with reference to the validity of its ordinances is to be tested by the sanction which it has from the Legislature to perform such acts, and in such cases the point to be determined is not whether any particular ordinance is contrary to the constitution, but whether it is permitted by an act of the Legislature. The question would then arise whether the law of the Legislature under which the Council acted was constitutional or not.

The city ordinance of the nineteenth December, 1871, and the ordinance of the 30th December of the same year, are not in violation of the act of the sixteenth of March, 1870 section 13, which provides that the Common Council of New Orleans shall, once at a regular meeting in the month of December, and not oftener, in each and every year, lay an equal and uniform tax, etc., etc.

The ordinance of the City Council, seventh May, 1872, levying a third tax in addition to those levied by the ordinances of the nineteenth and thirtieth December, 1871, is not contrary to the statute which provides that taxes shall only be levied once a year in the month of December, because said ordinance rests on the act of the twenty-fourth April, 1872, which authorizes the levying of said tax on an estimate to be made from the tax rolls of 1871. The objection that this act is unconstitutional because retrospective in its effect can not be maintained.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. George S. Lacey*, city attorney, for plaintiff and appellee. *M. M. Cohen*, for defendant and appellant.

MORGAN, J. Defendants appeal from a judgment by default, rendered against them, assign several errors in the proceedings and judgment, apparent on the face of the record, and founded on law.

First—His first assignment of error is, that the Administrator of Finance has not signed the tax bills.

We do not find any law which requires that these bills shall be signed by the Administrator of Finance.

Second—There is no stamp on either bill or receipt.

We do not think that this was necessary.

Third—The judgment lacks specification. By this he means that the amount assessed on real estate is not separated from the assessment on merchandise, capital, and money at interest.

We do not find that the law requires that the judgment should be made up of different parcels. It is sufficient that the property be separated on the tax bill. This was done.

Fourth—There was no sufficient proof of publication.

Section nine of the amended city charter provides, that all taxes imposed by the city of New Orleans, or due to the same, and not paid on the thirty-first July, of each year, shall be exigible, with interest at the rate of ten per cent. per annum from that date, upon thirty days' notice, by the Administrator of Finance, during which delay there shall be three publications in the official journal.

It was established by the testimony of Chadwick, that the notices were published at least four times, in the New Orleans Republican, to wit: on the twenty-second, twenty-seventh and thirtieth August, and on the nineteenth September, 1872; and the several papers in which the notice of publication was made were offered in evidence, and were subsequently filed. This we think a sufficient compliance with the law.

Fifth—The publications were insufficient. The first publication was on the twenty-second August, and the last on the nineteenth September following.

Default was taken on the fifth November, 1872, and confirmed on the twentieth of the same month.

We do not understand that the law requires the notices referred to shall be published for thirty days. It says that they shall be published and judgment shall not be pronounced until thirty days after notice. We consider the provision of the law similar to the rules governing citations. Judgment by default can not be rendered until ten days after citation, but the citations are not to be made daily; one is sufficient. So in the case of city taxes. The law declares that no judgment shall be rendered until after thirty days notice, the notice to be thrice published. Here the notices were published four times, and the judgment by default was not rendered until some fifty days after the first notice was published. This we consider sufficient.

Sixth—The notice of judgment is defective. The allegation in the brief being that sheriff's return is "served, a true copy of the within writ of judgment," etc., and that the copy of the judgment does not contain the signature of the judge.

We do not see how the sheriff by his return can vitiate a judgment simply because he calls it a writ of judgment, nor do we see that it was indispensably necessary that the copy of the judgment should contain the signature of the judge. The judge, we believe, never does sign the copy of the judgment which he renders against a party. If the argument means that the clerk should have mentioned that the judgment was signed by the judge, we answer that this is not sacramental. What is necessary to the defendant is notice of the judgment, and the certificate of the clerk that the judgment was rendered is sufficient. If the position assumed be correct, no judgment has been rendered against him, and if no judgment was rendered against him there is nothing against which he can complain, and therefore he has appealed from nothing, and his appeal would be dismissed.

Seventh—The ordinances are void because the aggregate rate of taxation exceeds two per cent.

The ordinances No. 1261, 1262, 1272, passed in the month of December, 1871, do not make the aggregate taxation exceed two per cent., and this objection, so far as these ordinances are concerned, can not be maintained.

Eighth—Ordinances No. 1497 and 1498 are illegal.

Ordinance No. 1497 was adopted seventh May, 1872.

Ordinance No. 1498 was adopted twenty-sixth April, 1872.

These ordinances are, it is urged, illegal, because they were adopted (if they ever were adopted) long after the date fixed by law for the assessing and levying of taxes in the city of New Orleans.

No estimate, it is contended, was made for the collection of taxes embraced in the ordinances. Added to the tax ordinance adopted December, 1871, they show an excess of taxation higher than the maximum rate of taxation allowed by law, and hence are in contravention of prohibitory laws, and are, therefore, illegal and void; and it is further contended that inasmuch as these ordinances assess and levy taxes upon the rolls of 1871, they are unconstitutional, being violatory of article 110 of the constitution, which forbids the passage of laws having a retroactive effect. We do not know that an ordinance of the City Council of New Orleans can be questioned with regard to its being in contravention of an article of the constitution. The City Council is the legislative body of the corporation. As such it derives its powers from the Legislature. It exists only at the pleasure of the Legislature. Its powers are specifically defined and expressly limited, and it can do nothing except what it is permitted to do.

The question with reference to the validity of its acts is to be tested by the sanction which it has from the Legislature to perform such acts, and, in such cases, the point to be determined is not whether any particular ordinance is contrary to the constitution, but whether it is per-

mitted by an act of the Legislature. The question would then arise, whether the law of the Legislature under which the council had acted was, or not, unconstitutional.

But it is contended that the common council are, by the act No. 164, approved March 20, 1856, section 42, allowed once, and not oftener, in each and every year, to lay an equal and uniform tax upon all property, real and personal, in this city; and we are solicited to note the word "once," and the words "and not oftener, in each and every year." And our attention is invited to the act of sixteenth March, 1870, section 18, which provides that the common council of New Orleans shall, once, at a regular meeting, in the month of December, and not oftener, in each and every year, lay an equal and uniform tax, etc., etc. It is urged upon us, that because, on the nineteenth December, 1871, the city passed one ordinance, the ordinance passed afterward, on the twenty-sixth December, 1871, was contrary to the statute which declares that the council shall levy taxes once a year, in the month of December. We can not give our concurrence to such a proposition. Under the statute referred to, the ordinances fixing the rates of taxation must be fixed in the month of December, but we do not understand that all the taxes of the city, upon all the property of the city, distributing the taxes upon the various property and the callings of the citizens, should all be passed at once and on the same day. Such a thing would be impracticable if not impossible. Certainly it would be attended with mischief and injustice, for it would be impossible for any set of men to determine in one day, a fair and equitable rate of taxation, to which all the property, real and personal, in the city, should be subjected.

In this same connection it is contended that inasmuch as on the seventh May, 1872, the City Council passed another ordinance levying other taxes, the ordinances levying these taxes is contrary to the law which provides that taxes shall only be levied once a year, in the month of December. This proposition would be unanswerable if it were not for the act of twenty-sixth of April, 1872, which authorizes the levying of these taxes, the estimate to be made on the tax rolls of 1871. And here comes in the question, is this law unconstitutional because it is retrospective in its operations?

Ninth—Ordinances Nos. 1497 and 1498 are not in evidence.

If this be true, then we have been considering an exhaustive constitutional argument for nothing. If they are not in evidence there is nothing upon which counsel's argument can rest. Upon this point we agree with the City Attorney when he says that the city, having made out her bill of taxes under those ordinances, and having offered the same in evidence, together with proof of publication of notice to delinquent taxpayers, it was the duty of the court to render judgment in

City of New Orleans v. Crescent Mutual Insurance Company.

favor of the city; and there being nothing in the record to show error in the judgment thus rendered it should be affirmed with costs.

The last objection is that the court is without jurisdiction, and it is urged that when service of notice is made by publication the court acquires no jurisdiction until proper proof of the publication of such notice, and of a compliance with each of the other requirements of the statute is filed and made to appear in the record. This objection has already been disposed of, in the opinion which we have expressed with regard to the third and fourth points in appellant's brief.

Counsel for the city prays for damages on the ground that the appeal is frivolous and taken for delay. But we do not agree with him altogether, and so merely affirm the judgment.

Judgment affirmed with costs.

2934.

JOHN L. YULE v. THE CITY OF NEW ORLEANS. ROBERT HOWES v. the same. (Consolidated.)

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The city of New Orleans is not bound to indemnify its citizens for any loss by fire occasioned by the negligence of the fire department. It can not be looked upon as an insurer against such losses.

There is no contract, express or implied, between the citizens and the city of New Orleans to indemnify them for any loss which may occur to them by reason of the burning down of their houses, except in cases specially provided by law.

The Firemen's Charitable Association has always been a voluntary one, its members are not paid, and the \$126,000 per annum, allowed to them out of the city treasury, are only a subsidy, to enable the association to carry out its objects.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Howe & Prentiss, Race, Foster & Merrick*, for plaintiffs and appellees. *G. S. Lacey*, City Attorney, for defendant and appellant.

MORGAN, J. Yule claims from the Firemen's Charitable Association and the city of New Orleans, five thousand dollars. Howes claims from the same defendants thirty-nine thousand five hundred dollars.

They both reside in the third district of this city, where they own property. Their claims rest upon the same state of facts, and are based upon the same law. The cases were consolidated, and tried together. There was judgment, against them in so far as the association is concerned, in their favor as against the city—Yule for \$5,000, and Howes for \$35,000.

From these judgments the city alone has appealed.

The allegations in both petitions are substantially the same. They aver that on the nineteenth May, 1867, at about the hour of half-past three P. M., a fire broke out on the square in which their property is situated, but remote from it, and that it was all destroyed. They allege that when the fire occurred nearly all the firemen, with

Yule v. The City of New Orleans. Howes v. the same.

their engines and hooks and ladders, were, by permission of the Common Council of New Orleans and of the Firemen's Charitable Association, at the Fair Grounds, some miles distant from their engine houses, where by law they should have been, and where they "spent the day in feasting, fun and frolic," and they allege that it was because of the absence of the firemen and their engines that their property was destroyed.

The ground upon which they seek to make the association and the city responsible is that the city of New Orleans makes annual assessments upon all the real and personal property in this city, and collects taxes thereon, of which taxes they, the petitioners, pay their share, and that, in consideration thereof, the corporation of New Orleans assumes and by law is bound to protect all residents of the city in the preservation of their property from destruction by fire. They aver that, to this end, the city has sold the contract for the extinguishment of all fires in this city for and during the period of five years from the seventeenth December, 1866, to the Firemen's Charitable Association for the sum of \$120,000 per annum, to be paid monthly; that by the terms of this contract the association was at all times to have on duty a certain number of fire engines, attended by a certain number of officers and men for each, ready at the first alarm of fire to repair to and extinguish the same.

The broad question presented by the record is whether or not the city of New Orleans is bound to indemnify its citizens for any loss by fire, occasioned by the negligence of the fire department?

We think not. The city can not, we think, be looked upon in the light of an insurer against losses by fire. Its duty is to protect the lives and property of its citizens, as far as in its power lies, and to promote their comfort and convenience, but it is not to be held responsible for losses by fire. True it is that out of the taxes collected from the citizens \$120,000 per annum are paid to the Firemen's Charitable Association. It is also true that this association, in consideration of this sum, have contracted to have always ready for service, and properly manned, fifteen steam engines, four engine companies, and four hook and ladder companies; that the chief engineer of the association is to have the sole command at fires, and, in fact, that the management of the fire companies shall be under the control of this association. But there is no contract on the part of the association by which they undertake to put out all fires which may occur in the city, and there is no contract, express or implied, between the citizens of the city and the city by which the city is to indemnify them for any loss which may occur to them by reason of the burning down of their houses, except in cases specially provided for by statute.

It is true that the city pays \$120,000 per annum to the Firemen's

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Charitable Association, and that this sum comes from the city treasury. But this is only a subsidy to an association to enable it to carry out its objects. The fire department of this city has always been a voluntary one; its members are not paid. On the contrary, they have to contribute to the support of the association out of their own pockets, in addition to which they give their services at all fires—services than which none can be more meritorious or coupled with more exposure, risk and danger, for nothing. No one, we believe, is paid by them, except those parties who have to be constantly at the station houses, such as engineers, hostlers, etc., and without this subsidy they could not be kept up.

It is also true that the police of the city are paid by the city, and that it is their duty to protect the lives of its citizens, but we do not understand that the city is responsible in damages for all the crimes and offenses committed within its limits because the people are taxed to pay the police.

The people of the city have, by common consent, allowed their representatives to contribute a certain amount of money for the protection of their common property, but it by no means follows that because they have given this much to prevent loss, if possible, they must in addition, pay for the losses which occur, for, after all it is the people of the city who have to pay. They have paid enough, we think, when they have allowed \$120,000 a year to be contributed for their common defense, and should not be made to pay for damages which they did not cause.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed, and that there be judgment in favor of the defendants in both cases, with costs of both courts.

No. 4606.

STATE ex rel. BERNARD DAYRIES v. JOHN YOIST.

For certain reasons expressed in the statute of 1871, p. 126 of acts of 1871, prescribing the duties of tax collectors, the Governor is authorized to remove a tax collector from office. The relator in this case having a commission bearing date a month later than the commission of Yoist, the presumption is that the Governor had cause for removal of the latter, which was effected by the appointment of Dayries.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Hewes, J. Thomas J. Cooley & W. H. Cooley, O. Provosty*, District Attorney, *Haralson & Claiborne*, for relator and appellant. *Edward Phillips* and *Robert Semple* for defendant and appellee.

TALIAFERRO, J. This is a contest under the intrusion act between the relator Dayries and the defendant Yoist, each having a commission from the Governor of the State appointing each tax collector for the parish of Pointe Coupee.

 State ex rel. Dayries v. Yoist.

The commission of Dayries bears date subsequent to that of Yoist. For certain reasons expressed in the statute of 1871 (page 126 of acts of 1871), prescribing the duties of tax collectors, the Governor is authorized to remove a tax collector from office. The relator having a commission bearing date a month later than the commission of Yoist, the presumption is that the Governor had cause for removal of the latter, which was effected by the appointment of Dayries.

The judgment of the lower court is, therefore, erroneous in decreeing Yoist the legal tax collector and in dissolving the injunction with damages.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed.

It is further ordered that the injunction be perpetuated, that the relator, Bernard Dayries, have judgment in his favor decreeing him to be the legal tax collector of the parish of Pointe Coupee, and authorized to discharge the duties appertaining thereto, and to receive the emoluments arising from the said office.

It is further ordered that defendant Yoist pay all costs of these proceedings.

 No. 4459.

GEORGE W. LEE v. CHRISTOPHER C. PACKARD et als.

Where Effingham Lawrence mortgaged half of a plantation to secure some promissory notes, said mortgage being in favor of Casanave, or any other future holder of said notes, and the mortgaged property was subsequently transferred to Packard et als., who assumed to pay the said notes as part of the price, and the notes fell into the hands of Lee, who sued out an order of seizure and sale against the property, which order was enjoined by Packard et als.;

Held—That on the trial of the injunction, the court *a qua* did not err, in permitting Lee to introduce the authentic evidence upon which the order of seizure and sale was granted; and also, that the court did not err, in refusing to allow Packard et als. to introduce in evidence a letter of Effingham Lawrence, the mortgageor, on the ground of irrelevancy.

The purchaser of mortgaged property with the pact *de non alienando*, occupies no better position than the mortgageor, and can not enjoin the executory proceedings, or set up any defense which the latter could not.

No sale or partition of mortgaged premises can defeat the mortgage previously existing thereon.

The purchase of the property by Packard et als., the stipulations and arguments between them and the mortgageor, and the partition of the property among themselves, could not affect the rights of Lee, the holder of the mortgage notes.

The defendants, Packard et als., in partitioning the property among themselves and making partial payments, could not limit the operation of the mortgage upon the whole, because the mortgage was an indivisible obligation.

APPEAL from the Second Judicial District Court, Parish of Plaquemines. *Pardee, J. Sambola & Ducros*, for plaintiff and appellee. *C. C. Packard*, defendant and appellant, *in propria persona*.

WYLY, J. In May, 1869, Effingham Lawrence mortgaged half of a plantation in the parish of Plaquemines to secure his six promissory notes for twenty-five hundred dollars each, said mortgage being in

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Lee v. Packard et al.

favor of Pierre A. D. Casanave, or any future holder of said notes. The mortgaged property was subsequently transferred to the defendants, who assumed to pay the said notes as part of the price.

The notes fell into the hands of the plaintiff, who sued out an order of seizure and sale against the property. Thereupon the defendant, Christopher C. Packard, brought this suit to enjoin the executory proceedings. The court dissolved the injunction, and he has appealed.

We think the court did not err in permitting Lee to introduce the authentic evidence upon which the order of seizure and sale was granted; and also the court did not err in refusing to allow the appellant to introduce in evidence the letter of Effingham Lawrence, the mortgageor, on the ground of irrelevancy. Therefore the bills of exceptions to such rulings were not well taken.

The purchaser of mortgaged property with the pact *de non alienando* occupies no better position than the mortgageor, and can not enjoin the executory proceedings, or set up any defense which the latter could not. No sale or partition of the mortgage premises can defeat the mortgage previously existing thereon. Therefore the purchase of the property by the defendants, their stipulations and agreements with Lawrence, the mortgageor, and the partition thereof among themselves, did not relieve the property of the mortgage now sought to be enforced by George W. Lee.

The defendants, in partitioning the property and making the partial payments, could not limit the operation of the mortgage upon the whole property, because the mortgage was an indivisible obligation.

It is therefore ordered that the judgment be affirmed with costs.

Rehearing refused.

No. 4363.

THE STATE OF LOUISIANA v. THE NEW ORLEANS GASLIGHT COMPANY.

Where the exception was that the suit is premature, because it is an effort to make the courts declare, in advance, that the defendant, after the year 1875, shall not be permitted to exercise the privileges of a corporation under an act extending its existence until 1895, and alleged to be unconstitutional; that its present exercise of privileges is not alleged to be illegal; and that the suit, therefore, can not be maintained, if at all, until the alleged date of the expiration of its present privileges in 1875;

Held—That said exception is well taken.

This court is not authorized to declare theoretically an act of a co-ordinate branch of the government unconstitutional, when the act complained of is not only not alleged to be interfering with the exercise of any person's rights, but not even in operation.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Simeon Belden*, Attorney General, for plaintiff and appellee. *Semmes & Mott* and *J. A. Campbell*, for defendant and appellant.

MORGAN, J. On the first of March, 1860, the General Assembly of Louisiana passed an act entitled "An Act to extend the area of gas

lighting in the city of New Orleans, and to reduce the price now paid by gas consumers."

The first section of this act provides: "That the charter of the New Orleans Gas Light Company, as now established by law, shall remain in full force and effect until the first day of April, 1895; *Provided*, that nothing in this act shall be construed so as to continue the exclusive privilege granted to said company, beyond the period fixed by its present act of incorporation," etc.

This suit was instituted against the company by the Attorney General, under a resolution of the House of Representatives to declare the act aforesaid, in so far as it extends the chartered privileges and charter of the company, beyond the term limited by the act of the General Assembly of the year 1845 (which provides that the charter of the company shall expire on the first day of April, 1875) unconstitutional, null and void. The ground upon which this demand rests is that the title of the act in question violates the one hundred and fifteenth article of the constitution then in force when the act was passed, which provided that every law shall express its object in its title. It is alleged that the object of the law approved on the first of March, 1860, is not expressed in its title.

The defendant excepts to the action upon the following grounds:

First—That the suit was instituted without authority of law; that the Attorney General is not authorized to institute a suit of his own motion, and without legislative instruction, to have the courts declare an act of the Legislature unconstitutional, especially when the decree prayed for is merely a declaratory decree, without application to any specific act or alleged wrong done under the alleged unconstitutional act.

Second—That the suit is premature because it is an effort to make the courts declare, in advance, that the defendant after the year 1875 shall not be permitted to exercise the privileges of a corporation; that it is not alleged that its present exercise of privileges is illegal; and that the suit is therefore not maintainable, if at all, until the alleged date of the expiration of its privileges, to wit, the first of April, 1875; and

Third—That the petition discloses no cause of action whatever, nor a case of which the court has jurisdiction.

Conceding that the Attorney General has the right to institute a suit against a corporation to annul its charter, or to declare a law under which a corporation may be acting unconstitutional on his own motion; conceding that whereas by the constitution and laws of the State the Attorney General is obliged to give his professional services to either branch of the Legislature in matters concerning them, he can be called upon by one house, without the concurrence of the other, to institute proceedings to cause an act passed by both to be declared by the courts unconstitutional—upon neither of which propositions do we

find it necessary to express an opinion—still it is clear to our minds that this suit is premature.

This is not a suit to annul the charter of the gas company because of its having violated any of the rights, privileges or obligations conferred upon it by the act incorporating it. No one complains of the company, and it is not averred that it is exercising any right, that it claims any privilege, or that it interferes with any of the rights of others, in virtue of the act which we are asked to declare unconstitutional. When this happens it will be time enough for us to pass upon the question. Perhaps it may never happen.

The gas company may have ceased to exist before 1875, the date on which its charter, as alleged, expires; or if it exists, it may not desire to vend gas at that time. If this should happen, or if, from any cause, they should cease to supply the city and its citizens, and the State, the city, or any of its citizens, should endeavor to enforce what either of them might consider a contract between the company and the State, the constitutionality of the act of 1860 might possibly be invoked. Or if, in 1875, the company should continue its functions, and the State should attempt to prohibit it from doing so; or if, at that period, any citizen, or parties interested, should resist its pretensions, or should proceed against it for an infringement of his or their rights, and the company should set up the act in question in their defense, then the constitutionality of the law under which it will be acting, may be inquired into. All this will be time enough when the case arises, but no such case is now before us. We are called upon to declare, theoretically, that a law is unconstitutional, when no one is claiming to exercise any rights under it, and when no one is complaining that it is working them any injury.

It is our duty to declare an act of the General Assembly unconstitutional when the exigencies of the case require it, as delicate as the performance of this duty may be, but we do not think we should create the exigency. We have only to deal with the practical affairs of life; we have no warrant for expressing an opinion upon rights and duties which may or may not exist in the future. Much less do we feel ourselves authorized to declare an act of a co-ordinate branch of the government unconstitutional, when the act complained of is not only not alleged to be interfering with the exercise of any person's rights, but is not even in operation.

We think the exception to the prematurity of the action should have been maintained.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed; that the exception of the defendant as to the prematurity of the suit be maintained, and that the suit be dismissed. Plaintiffs to pay the costs.

State of Louisiana ex rel. Louisiana Levee Company v. Clinton, Auditor.

No. 4617.

STATE OF LOUISIANA ex rel. LOUISIANA LEVEE COMPANY v. CHARLES CLINTON, Auditor.

The amendment of the constitution of the State, ratified on the seventh of November, 1870, which limits the State debt to \$25,000,000, is not violated by the law creating the Levee Company. The bonds of the State are not out, nor is any one its creditor, nor can any one become its creditor, for any sum contracted for by the Levee Company.

It is not for the court, in this case, to determine that the payments demanded are, or are not, without a valid consideration. It has only to decide whether the acts relating to the Levee Board are constitutional or not.

The act No. 27, 1871, which ratifies and confirms the contract between the Levee Company and the Governor, is, after all, an act of the Legislature, and is valid unless conflicting with the constitution of the State, and this has not been shown.

The constructing of levees for the protection of lands subject to overflows is not made at the expense of the State treasury. That expense is met by a general tax on all the taxable property of the people of the State. The Legislature had the power to impose that tax and to appropriate it as they saw fit. They create no debt which goes beyond the constitutional limitation, and in the acts referring to the general levee tax have violated no provision of the constitution.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Armand Pitot, Semmes & Mott, H. O. Dibble*, for relators and appellees. *A. P. Field*, Attorney General, *J. S. Whitaker, J. B. Cotton, J. Q. A. Fellows*, for defendant and appellant.

MORGAN, J. On the twentieth of February, 1871, the Legislature passed an act "relative to the Louisiana Levee Company, a corporation organized under the general laws of the State, constituting it a body politic and corporate, with certain powers, privileges and franchises, and contracting with the said corporation for the construction, maintenance and repairs of certain levees, and providing for compensation therefor."

The relators declare that they have entered upon the duties imposed upon them by the act of incorporation above set forth, and have completed large works in accordance with their duties thereunder, and thus that they have protected from overflow a great portion of Louisiana at an expense of \$767,000, while they have only received therefor some \$400,000. They aver that in order to enable them to pay for the works contemplated by the act, already executed, and to be executed, the State has authorized the levying and collection of a tax of two mills upon the dollar of the assessed value of the taxable property of the State, to be set apart as a special fund to be known as the "Levee Construction Fund," and an additional tax of two-tenths of one per centum upon the assessed value of the taxable property of the State, to be set apart and known as the "Levee Repair Fund."

They aver that said taxes have been and are being collected and set apart as provided by law, and have been in part paid to the Louisiana Levee Company on the order of the president of said company, as money belonging to the same, and that said taxes are not funds belong-

State of Louisiana ex rel. Louisiana Levee Company v. Clinton, Auditor.

ing to the State, which could lawfully be appropriated for any of the expenses or indebtedness of the State.

They aver that there is now in the treasury a sum of \$13,000 belonging to said levee construction fund and to said levee repair fund, for which they have drawn according to law for \$6000 each, for which orders Charles Clinton, the Auditor of the State of Louisiana, refuses to give the necessary warrants on the State treasury, in violation of the law and of the vested rights of the relators. They pray for a mandamus against the Auditor directing him to issue warrants in their favor on the State Treasurer for the payment of the two orders for \$6000 each.

The Auditor, after filing a declinatory exception, answered, through the Attorney General, who is herein acting as counsel designated by law to the Auditor, as well as in his official capacity representing the State, and says:

First—That the act of the Legislature relative to the Louisiana Levee Company, and the act confirming a contract between the Louisiana Levee Company and the Governor of the State, approved twenty-eighth February, 1871, providing for an annual collection by taxation and appropriation to said company for twenty-one years of about one million dollars each, are unconstitutional, illegal, null and void, because they are in violation of the — amendment to the constitution of the State of Louisiana limiting the State debt to \$25,000,000, and of articles 110, 114 and 115 of the constitution of the State.

Second—That the payments demanded in the petition are without a valid consideration, and made to a person, a private corporation, having no legal claim upon the State, to be paid out of the revenues derived from the taxation of the property of the citizens and others owning property subject to taxation, and upon whom rested no legal or equitable obligation to contribute to the payment thereof.

Third—That the State Legislature had no power to authorize the Governor of the State to enter into the contract contained in the acts Nos. 4 and 27, nor to incur the obligations contained in the contract; that the proprietors of property fronting on the water courses of Louisiana, subject to overflow, had contracted in the original purchase of the property, to build and keep up the levees, and had, in consequence, purchased their lands at a much reduced price; that the leveeing and draining of lands subject to overflow at the expense of the State treasury, or by a general taxation on all the taxable property in the State, would be the enrichment of a portion of the people of Louisiana by making their property much more valuable and at the expense of other citizens and tax payers of the State; that it would be the taking of the property of one citizen or class of citizens for the benefit of another, and without a proper and adequate, or in fact any consider-

State of Louisiana ex rel. Louisiana Levee Company v. Chinton, Auditor.

ation whatever, and is in violation of the constitution of the State and of the United States.

Fourth—That the funds claimed are derived from the general taxation of the property of the State for the enrichment of the plaintiff, a private corporation, and for the enhancement of the property of a small portion of the property holders in the State, and that it was not in the power of the State to grant said funds, or to authorize the making of said contract; that the obligations created by the acts Nos. 4 and 27 is a debt of upward of \$20,000,000, attempted to be created at a time when the State debt exceeded \$25,000,000, and subsequent to the promulgation of the constitutional amendment limiting the State debt to \$25,000,000; that so long as the State debt shall exceed \$25,000,000, the Legislature can not make appropriations or authorize contracts, except for such purposes as are absolutely required and necessary for carrying on the government; that the work claimed to have been done and to be now being done by the plaintiff is not one of those necessary works or expenses for the carrying on the government, but is a work of internal improvement, which, at all times doubtful as a function of government, was designed to be prohibited by the amendment to the constitution limiting the State debt.

First—We do not see in what manner the — amendment of the constitution of the State, which limits the State debt to \$25,000,000, is violated by the law creating the Levee Company. The State has created no debt in their favor. It has assumed no responsibility on their account. It does not pay or order to be paid any money out of the funds of the treasury proper. The State incorporated the company, giving it certain rights and privileges, and imposing heavy burdens upon it at the same time. It contracted with the company with regard to a work of great public utility. To secure the company they imposed a general tax upon all the property of the State, and made it the duty of the tax collectors to collect the same and to deposit the sums collected in the treasury, but it provided at the same time that the moneys so collected should be placed to the credit of a certain fund, to be drawn upon by the officers of the company. But this does not create a liability on the part of the State. The State does not pay. Its bonds are not out, nor is any one its creditor, nor can they be its creditor for any sum contracted for by the Levee Company.

Second—It is not for us to determine that the payments demanded are without a valid consideration. We have only to determine whether the acts relating to the Levee Board are constitutional or not.

Third—The act No. 27, which ratifies and confirms the contract between the levee company and the Governor is, after all, an act of the Legislature, and is valid unless it conflicts with the constitution of the

State, and we have not been referred to the article with which it is in conflict.

The other objections to the act do not strike us with much force. The leveeing of the land subject to overflow is not made at the expense of the State treasury. It is, as is stated, made by a general tax on all the taxable property of the State, but the Legislature had the power to impose that tax, and to appropriate it as it saw fit.

Fourth—It is true that the funds claimed are derived from the general taxation of the property of the State, and it may be that it will result in the enrichment of the levee company; but the State had the power to levy the tax, and the profit would depend upon the perfection of the company's work. By the law under which they are acting, they are responsible to the owners of property who suffer damage by reason of their negligence or want of skill. A crevasse at Grand Levee, or at Kenner, or at any one of the several other points on the river, caused by their negligence in maintaining these levees up to the standard required by the law, as evidenced by the report of commissioners to whom such matters are intrusted, would cause more damage to the company than the amount of the taxes to which they would be entitled. But these are questions with which, in reality, we have nothing to do. The only matters which we are called upon to decide are whether the acts of the Legislature, in themselves, violate any of the articles of our constitution, and whether the Legislature has created a debt which goes beyond the constitutional limitation. We do not find that these acts do violate any provision of the constitution, or that they create a debt. We therefore think the company entitled to the money which it claims, and that the mandamus properly issued.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court be affirmed, with costs.

LUDELING, C. J. I doubt the right of the defendant to raise the questions presented for decision in this case.

He has no real or actual interest involved in this controversy.

If, however, I be mistaken in this, then I concur in the opinion of the majority of the court.

Under either hypothesis I concur in the decree.

Rehearing refused.

Widow Benjamin Poydras de La Londe et als. v. Poydras.

No. 3828.

WIDOW BENJAMIN POYDRAS DE LA LANDE et als. v. CHARLES POYDRAS.

Where the defendant bought certain slaves, who, by the will of one of their former owners, were to be emancipated at a future time, but were not so emancipated by the defendant, who made no efforts to surmount the obstacles that were in the way of their emancipation, but who was content to retain them in the condition of slavery, and to avail themselves of their labor until they were set free by the Government of the United States; Held—That said defendant has no legal ground to refuse to pay the promissory note which he gave for the purchase of said slaves.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Miller J. A. L. Mahoudeau and O. E. Schmidt* for plaintiffs and appellees. *Edward Phillips*, for defendant and appellant.

TALIAFERRO, J. At a probate sale in the year 1854 the defendant purchased from the estate of Benjamin Poydras de La Lande a plantation in the parish of Pointe Coupee, with twenty-four slaves upon it, who were among the slaves entitled to their freedom by the provisions of the will of Julien Poydras, an ancestor of these parties who died many years since. Three other negroes, slaves for life, were sold with this lot of twenty-four together with the plantation. The whole price was fifteen thousand dollars, one-third cash, the remainder in four annual installments of three thousand dollars each. Special mortgage and vendor's privilege were retained to secure payment of the several notes given at the sale.

The plaintiffs sue upon the last note due and pray judgment for three thousand dollars, with interest at the rate of eight per cent. per annum from the thirty-first of January, 1861, and that the land be seized and sold to pay the debt.

The judge *a quo* ordered an appraisement of the land and slaves to ascertain the relative value thereof at the time the defendant purchased, and finding that relative value to be ten thousand dollars for the plantation and the improvements upon it, and five thousand dollars for the slaves, rendered judgment in favor of the plaintiff for two-thirds the amount of the note sued on with recognition of plaintiff's mortgage and vendor's privilege on the land.

From this judgment the defendant appealed.

The defense is that the twenty-four negroes the defendant purchased were free at the time of the sale of the succession of Benjamin Poydras, and that the sale of free persons being *contra bonos mores*, is null and violates the entire contract. He contends further that the proportional sum paid by him on the two previous notes for the negroes as slaves, amounts to more than that of the land, and if held bound at all, such proportional sum should be imputed to the payment of the land.

The title acquired by the defendant from the estate of Benjamin Poydras expresses the following condition: After giving the name and description of the twenty-four negroes the act proceeds, "which above

named slaves proceed from the slaves which were sold at the sale of the property of the succession of the late Julien Poydras, and are by the present act transferred subject to the conditions and stipulations expressed in the testament of the said late Julien Poydras, and in the acts which have transferred the ownership of the said slaves to the several purchasers of the property of the estate of the late Julien Poydras, and more particularly in the act of sale of the land or plantation on which he resided from which the said slaves have been detached. The said slaves hereinabove named are therefore by the present act, transferred under the conditions and stipulations expressed in the said will or testament, and in the acts above mentioned, and to which reference is here made, without any other warranty of any nature whatever; with which conditions and stipulations the purchaser declared he was well acquainted, that he accepted them, and was satisfied therewith, and that he put himself in the lieu and stead of the vendors, promising that he would comply with and fulfill the same."

It is in evidence that the twenty-four slaves here referred to were not emancipated by the defendant, and that they were never emancipated otherwise than by the general emancipation resulting from the late war. There were no doubt serious obstacles to carrying out the provisions of the will of Julien Poydras in regard to the emancipation of his slaves. The law and public policy of the State were strongly against it. Bullard and Curry's Digest, page 427; Criminal Code, articles 184, 185; Acts of 1852, page 214. The subsequent act of fifteenth March, 1855 (Acts of 1855, p. 387), was, perhaps, less stringent in regard to emancipation than the previous legislation on the subject, but it seems clear that whatever the obstacles in the way, the defendant made no effort to surmount them. He was content to retain the negroes in question in the condition of slavery, and to avail himself of their labor, until they were set free by the United States government. Nor can we consider the condition of these negroes otherwise than that of *statu liberi*. They acquired under the will of Julien Poydras the right of thereafter becoming free. It seems that by the will, they were to continue in slavery twenty-five years after the sale ordered by the testator, and their offspring born in the meantime were also to remain slaves until they should be in the condition and of the age required by law for such emancipation. The will of Julien Poydras is dated April 16, 1822, but there is nothing in the record showing either the time of his decease or the time at which his lands and slaves were sold.

After a careful review of this case, we do not find good cause for altering the decree of the lower court. 21 An. p. 757, and same, p. 771.

It is therefore ordered and adjudged that the judgment of the district court be affirmed, with costs.

No. 4674.

STATE OF LOUISIANA v. WILLIAM CARR, *alias* JAMES F. HICKEY.

25	407
50	139

When the judge *a quo* had already charged the jury that "they must be satisfied that the prisoner knew the certificates he published as true were false at the time of passing them, and that, if they had any reasonable doubt of his guilt, they must acquit him ;"

Held—That this was substantially the charge asked for by defendant's counsel, though not identical in language, and that it met all the requirements of the law.

Where the judge *a quo* refused to charge the jury, as requested, that "the fact that defendant had offered no evidence is in no way to be taken as an admission of guilt," instead of which the judge charged "that all circumstances against the prisoner within his power to explain, which he refused to do, were to be taken and weighed by the jury as circumstances against the prisoner ;"

Held—That this was an error. The accused is justified in relying, if he chooses, upon the insufficiency of the evidence adduced by the prosecution, and his so doing should not be taken as an acknowledgment by him of his guilt.

Section 10 of act 73 of 1872 does not so far abrogate section 833, Revised Statutes of 1870, that a person may not be indicted under the former, as was done in this case, for "publishing as true, false, forged and counterfeited certificates of a public officer," etc. Both laws are easily construed so as to give effect to each, and will support an indictment, if properly drawn up under each respectively.

The indictment properly sets forth the offense of which the prisoner is accused, as described in section 833, Revised Statutes of 1870, under which said indictment is drawn, and is not defective in substance. It follows substantially, if not literally, the language of said section.

A PPEAL from the First District Court, parish of Orleans. *Abell, J.*
Criminal case. *John McPhelin*, District Attorney, for the State.
A. A. Atocha, for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment sentencing him to four years' imprisonment at hard labor in the State penitentiary, upon being found guilty of the charge of "publishing as true false, forged and counterfeited certificates of a public officer," etc., under section 833 R. S. of 1870. The case is before us on two bills of exception and a motion in arrest of judgment.

First—The first bill is to the refusal of the judge *a quo* to charge the jury as requested by counsel for defendant, that "the prosecuting officer must prove that the party accused knew the certificates uttered were forgeries ; if the jury have any doubt as to the guilty knowledge, that being the essence of the offense, they must acquit." The judge had already charged the jury that "they must be satisfied that the prisoner knew the certificates to be forged at the time of passing them, and that if they had any reasonable doubt of his guilt they must acquit." This was substantially the charge asked for by defendant's counsel, though not identical in language, and met the requirements of the law. In 3 Graham & Waterman on N. T. 710 et seq., quoted by appellant's counsel, it is said "the court is not bound to give instructions in the words asked for, however material might the instructions be. But it must take care to give the instructions substantially, so as to meet the whole of the point which is material."

Second—The second bill is to the refusal of the judge to instruct the

State of Louisiana v. Carr, alias Hickey.

jury that "the fact that defendant has offered no evidence is in no way to be taken as an admission of guilt." Instead of which the judge charged "that all circumstances against the prisoner within his power to explain which he refuses to do, are to be taken and weighed by the jury as circumstances against the prisoner."

We think the court erred in the refusal, and particularly as he added a charge in words which might have induced the jury, under the circumstances, to believe that defendant's omission to offer any evidence was an admission of his guilt, which is not correct in principle, as the presumption of innocence exists in favor of the accused, and the prosecutor must prove the guilt beyond a reasonable doubt. The accused is justified in relying, if he chooses, upon the insufficiency of the evidence adduced by the prosecution, and his so doing should not be taken as an acknowledgment by him of his guilt.

As this case must be remanded for a new trial, we think it well to pass on the points in the motion in arrest of judgment.

First—"The indictment is founded on section 833 R. S. of 1870, and should have been based on section 10 of article 73 of 1872."

Section 833 provides that, "whoever shall forge or counterfeit, or falsely make or alter, * * * any certificate or attestation of any public officer, in any matter wherein his certificate is receivable and may be taken as legal proof, * * * or shall alter or publish as true any such false, altered, forged or counterfeited certificate or attestation, * * * knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person, * * * shall be punished by imprisonment at hard labor, for not less than two, nor more than fourteen years."

Section 10 of article 73 of 1872 provides: "That it is hereby declared a felony to forge or falsely sign, fill up, alter or utter, or publish as true any * * * certificate, * * * or any part thereof, as given, made out or signed by the Mayor or any administrator of department of the city of New Orleans, or by any officer, deputy, clerk or other person authorized by them, or either of them, and which may be given credence to, or pass, or be received as genuine or authorized, and be calculated to deceive or defraud any holder, receiver, transferee, pledgee, or other person. Any person, upon being found guilty of such offense, shall be sentenced to imprisonment at hard labor not less than two nor more than twenty years."

We do not see that the latter law so far abrogates the former that a person may not be indicted under the former, as was done in this case, for "publishing as true, false, forged and counterfeited certificates of a public officer," etc.

Both laws are easily construed so as to give effect to each, and will support an indictment if properly drawn up under each respectively.

Second—"Whether preferred under the one or the other statute, the indictment does not properly set forth the offense, and is defective in substance."

The first count reads, "feloniously and falsely did publish as true, with intent to injure and defraud Louis W. Perkins, * * * a certain false, forged and counterfeited certificate of a public officer, in a matter wherein his certificate is receivable, and may be taken as legal proof, to wit: a certificate purporting to be a certificate of appropriation of the city of New Orleans, numbered 18,195, for the sum of \$601 50 (six hundred and one dollars and fifty cents), purporting to be issued from the department of public accounts of said city, and purporting, moreover, to be signed by N. C. Snethen, and to be paraphed by J. C., meaning John Calhoun—he, the said William Carr, alias James F. Hickey, at the time he so published as true the aforesaid false, forged and counterfeited certificate of a public officer, in a matter wherein his certificate is receivable, and may be taken as legal proof, then and there well knowing the same to be false, forged and counterfeited, contrary to the form of the statute in such case made and provided."

This does, in our opinion, properly set forth the offense described in section 833, R. S. of 1870, under which the indictment was drawn, and is not defective in substance. It follows, substantially if not literally, the language of said section in declaring the publishing as true a false, forged and counterfeited certificate of a public officer, naming one, and describing the certificate so published, and charging knowledge and the felonious intent. The other two counts are equally if not more explicit. Under sections 1049 and 1059 R. S., the description of the instrument is sufficient.

It is therefore ordered that the judgment appealed from be reversed, and that this cause be remanded for a new trial, in accordance with the foregoing opinion and the law.

No. 2966.

W. B. WHITEHEAD v. THOMAS S. DUGAN.

25	409
121	311

This action, as its character appears from the petition, is a suit for a tort or trespass; and the defendant is sought to be made liable *in solido* as a co-trespasser with another person, with whose trespass, if committed, he is in no manner connected.

If such an action would lie against the defendant, it is certainly barred by the prescription of one year, which is pleaded.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. E. Filleul, Randolph, Singleton & Browne*, for plaintiff and appellee. *Julian Michel, Clarke, Bayne & Renshaw*, for defendant and appellant.

WYLY, J. The plaintiff alleges that he is the owner of a sugar

plantation in the parish of St. Charles, on the Mississippi river, and adjoining the plantation lately belonging to one Hoyt and now owned by the defendant, Thomas S. Dugan; that within the last twenty-four months the hands and laborers employed on said plantation, now owned by said Dugan, have trespassed on your petitioner's said lands, and cut wood and timber to the value of \$3115 90, according to the account annexed to the petition; that a very large portion of said wood, timber, staves, bridge timber, etc., if not the whole, was on the said Dugan plantation at the time Dugan purchased it from Hoyt, as before stated, which the said Dugan well knew at the date of said purchase, and in order to protect himself from the just demands of your petitioner, as set forth above, the said Dugan had inserted in the act of sale by which he acquired said plantation from said Hoyt, a clause whereby he sought to indemnify himself against the said demands of your petitioner; that the said Dugan refused to deliver to your petitioner said wood, staves, bridge timber, etc., and has used for his own benefit a large portion thereof, and retains unlawful possession of the balance; "that by reason of the foregoing and the said acts of the said Dugan he became a co-trespasser with said Hoyt, and is liable *in solido* to your petitioner for the full value of all of said wood, staves, bridge timber," etc.

These are the allegations of the petition, and the prayer is for judgment against Dugan for the sum of \$3115 90.

The defendant denied generally the allegations of plaintiff's petition, and specially denied the allegation charging him with being a trespasser upon the plaintiff's lands. He also pleaded the prescription of one year in bar of plaintiff's action.

The court gave judgment against the defendant for \$544 50, and he has appealed. We have carefully stated the pleadings, because we have not found that they disclose a cause of action against the defendant.

Where the obligation arises that the plaintiff seeks to enforce we are at a loss to conceive. That Dugan bought a plantation from Hoyt, on which was a quantity of wood, staves, bridge timber, etc., which had previously been cut from the land of the plaintiff did not make Dugan a trespasser. It did not create an obligation against Dugan; because as to the latter there was no offense, quasi-offense, contract, or quasi-contract, nor an obligation arising by operation of law in favor of the plaintiff.

The clause referred to in the contract between Hoyt and Dugan, created no legal obligation in favor of the plaintiff; nor did it create an obligation in favor of Hoyt. The obligation arising from that clause was the obligation of warranty, of which Dugan was the creditor, not the debtor.

It is as follows: "The said Mark Hoyt covenants and warrants to and with said Thomas S. Dugan, that all debts and dues of the laborers, employes, furnishers of supplies or materials on or for the use of said plantation, up to the fifteenth of March instant inclusive, have been paid; that the parish taxes for the year 1867 have been paid, and that the said Hoyt shall pay all other taxes, such as State tax, convention tax, etc., as may be due and payable up to said fifteenth March, 1868; and that if any claim be made and recovered by William B. Whitehead, for wood or staves alleged to have been cut by said Hoyt on the land claimed by said Whitehead, he, the said Hoyt, shall be responsible therefor to said Dugan, and indemnify the latter for all damages he may suffer in consequence of said claim."

As security for this obligation of warranty, Hoyt deposited with Dugan two thousand dollars and took the following receipt: "Received, New Orleans, March 24, 1868, from Mark Hoyt, Esq., two thousand dollars, which I shall return to him as soon as he has satisfied me as to the payment of the taxes due on the Killona plantation, and as to the claim of William B. Whitehead, as stated in the act passed between Hoyt and myself, before P. C. Cuvellier, notary, under date of this day."

Neither the clause in the act referred to, nor the receipt just quoted, created an obligation in favor of the plaintiff; nor do they in the least advance his pretensions against the defendant. They in no manner authorize the defendant to settle the unliquidated claim for damages which the plaintiff had against Hoyt.

Suppose the defendant were to give the two thousand dollars which he received from Hoyt to the plaintiff in settlement of the claim of the latter against the former, and Hoyt were now suing him for the money, would the defendant, the depositary, be heard in defense to say that he used it in settling the claim for damages which Whitehead had against Hoyt, when that claim, not having been sued on, is barred by prescription? And besides it was a claim which Dugan was in no manner bound to pay.

The action, as its character appears from the petition, is a suit for a tort or trespass; and the defendant is sought to be held liable *in solido* as a co-trespasser. If such an action would lie against the defendant, it is certainly barred by the prescription of one year, which is pleaded.

The industry in cutting the trees and making the staves and bridge timbers greatly exceeds the value of the trees before they were cut; and the party bestowing this industry would have the right to keep them on paying the value of the trees. Revised Code, 526.

So, therefore, if no damages had been claimed, and the staves and bridge timbers were seized in the possession of Hoyt, he would have the right to keep them on the condition of paying the owner of the trees

Whitehead v. Dugan.

their value at the time they were cut. But such a case is not before the court.

The defendant is simply sought to be held liable for a tort committed by Hoyt, and with which he is in no manner connected.

It is therefore ordered that the judgment herein be annulled, and it is further ordered that there be judgment for the defendant, plaintiff paying costs of both courts.

Rehearing refused.

4663.

STATE OF LOUISIANA v. L. E. LEMARIE and als.

Where the defendant being sued as a defaulting tax collector, his defense was that the State Treasurer illegally refused to receive from him certain State warrants which he alleged he took in payment of taxes;

Held—That the defense was not tenable, because at the time the warrants were tendered, the treasurer was enjoined by the Superior District Court from receiving the same, and because said warrants were illegally issued, no appropriation for such purpose having been made as required by article 104 of the constitution, and because the defendant did not, in relation to those warrants, comply with the provisions of section 3337, Revised Statutes.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. A. P. Field*, Attorney General, for plaintiff. *Henry C. Dibble*, for defendant and appellant.

HOWELL, J. The defendant is sued as a defaulting tax collector. His defense is that the State Treasurer illegally refused to receive from him certain State warrants, which he alleges he took in payment of taxes. The only matter now in contest is his right to pay into the treasury State warrants, amounting to \$5469 23, which were issued by James Graham, Auditor, from August 2 to December 2, 1872, for alleged election expenses. The Treasurer refused to receive them because at the time they were tendered to him he was enjoined by the Superior District Court from receiving them, and in addition to this the Attorney General contends that the said warrants were illegally issued, no appropriation for such purpose having been made as required by article 104 of the constitution, which he says is the ground of the said injunction, and further that the defendant did not indorse upon each warrant the date, from whom received, and the amount of taxes thereby paid by the party from whom such warrant was received, as required by section 3337 Revised Statutes.

Each of those grounds is sufficient to justify the refusal of the treasurer.

There was no appropriation, as it appears, on which the warrants could be drawn, and we will add that the testimony of the defendant himself does not satisfy us that he received the warrants in question from taxpayers in payment of the proportion of their taxes, which, it

State of Louisiana v. Lemarie and als.

is contended, may be paid with State warrants. Conceding that the tax collectors may be properly authorized to receive State warrants in payment of a specified proportion of the taxes, upon which we express no opinion, they must be careful to receive only such warrants as are issued under specific appropriations and are specially made receivable for taxes, and when so received the tax collectors must comply with the above law and indorse on each warrant the date of its reception, the name of the taxpayer and the amount of his taxes so paid with such warrant, and they are further required by the said law to make oath that the warrants they pay "into the treasury are the identical warrants received by them, and that they have not purchased or speculated in warrants in any way, directly or indirectly, and that they have received said warrants at their face value." This has not been done by the defendant.

Judgment affirmed.

No. 4627.

STATE ex rel. M. PHILLIPS v. NEW ORLEANS GAS LIGHT COMPANY.

25	413
0114	327
25	413
115	783

There seeming to be no special denial of defendants in this case, of their obligation to issue certificates of stock to the owners thereof, the proceeding by mandamus is authorized to compel them to do so, if the ownership is not disputed.

The loss of plaintiff's certificates and the advertisement thereof being sufficiently established, the defendants can not refuse to issue new certificates on the ground that a bond of indemnity is not furnished. There is no good reason for requiring such a bond. The stock can not be transferred by relator except upon the books of the respondent and on the production of the certificates. This is sufficient protection to the company.

A PPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. George L. Bright*, for plaintiff and appellee. *J. A. Rozier*, for defendant and appellant.

HOWELL, J. The respondents have appealed from a judgment making peremptory a mandamus directing them to issue to relator two certificates of stock in lieu of two lost by her. The defense is that no cause is shown for a proceeding by mandamus; that the relator can obtain relief by an ordinary action; that plaintiff has not lost the certificates as alleged; that according to the by-laws of the company the loss of certificates must be advertised for a certain time, and new ones may be issued upon the applicant therefor giving bond and certificate; that defendants have at all times been willing to issue and deliver to the relator new certificates, provided relator proves the loss, the advertisement thereof, and furnishes a bond of indemnity, as required by the said by-laws, which relator fails and refuses to do, and that defendants apprehend that relator may have sold, transferred, pledged or parted with said certificates.

There seems to be no special denial of defendants' obligation to issue

State ex rel. Phillips v. New Orleans Gas Light Company.

certificates of stock to the owners thereof, and hence the proceeding by mandamus is authorized to compel them to do so if the ownership is not disputed. The question here relates to the applicant's right to new certificates in lieu of those which it is admitted she owns, but it is denied that the facts entitle her to such new issue.

We concur in the opinion of the judge *a quo* that the relator has shown her right to the new certificates demanded. The loss and the advertisement thereof are sufficiently established, and we do not think the defendants can refuse on the ground that a bond of indemnity is not furnished. We can perceive no good reason for requiring such a bond. The stock can not be transferred by relator, except upon the books of the respondent and the production of the certificates. This, it seems to us, is a protection to the company. The relator is entitled to certificates of her stock.

Judgment affirmed.

Rehearing refused.

No. 2768.

MIGUEL G. DE LIZARDI v. THE NEW ORLEANS CANAL AND BANKING COMPANY.

The seizure of A's property under a suit against B, is a quasi offense, and the action based upon an obligation springing from a quasi offense, is prescribed by one year.

Where it was contended that even if the source of the obligation incurred by the defendant be conceded to have been a quasi offense, such as the wrongful attachment of the plaintiff's property, still the prescription should not begin to run until the end of the wrongful act, for until then the amount of the damages done by the continuous attachment could not have been ascertained;

Held—That if there is good reason why the law regulating prescriptions in such cases ought to be as is contended, yet that this court has no right to alter the positive provisions of the code which declares that prescription runs from the date on which the injury or damage was sustained.

But it is incumbent upon the party pleading prescription to show what portion of the damages proved occurred anterior to the year preceding the institution of the suit, or in other words, to establish what part of the plaintiff's demand is prescribed.

In fixing the rents due for the plantation seized, the highest estimate which the evidence will permit must be adopted, as the property was tortiously taken from the possession of the plaintiff.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard*, J. Trial by jury. *Roselius, Alfred Philips* and *A. Robert*, for plaintiff and appellee. *Lea, Finney & Miller, Campbell, Spofford & Campbell, Hyams & Jonas*, for defendants and appellants.

LUDELING, C. J. The plaintiff sues for eight hundred and seventy-five thousand five hundred and eighteen dollars and ninety-three cents. It is alleged that the petitioner has been and still is the owner of a sugar plantation situated in the parish of Plaquemines, in this State, known as the Santa Anna Plantation; that while he was in the peaceable possession and enjoyment of said plantation, with all the appurtenances thereunto belonging, the said New Orleans Canal and Banking

25	414
50	585

25	414
110	718
110	744
110	846
110	847

25	414
116	485
116	486

25	414
125	544

Company instituted a suit against Manuel Julian de Lizardi, on or about the fifteenth of July, 1861, by virtue of a writ of attachment issued in said suit, said defendant illegally and wrongfully directed the sheriff to levy said attachment on the said sugar plantation, a large quantity of sugar and molasses, and other property on said plantation, all of which is detailed and set forth in the return of said writ of attachment on file in said suit, in this honorable court; that said illegal attachment and seizure of the property of your petitioner was persisted in by said defendant, notwithstanding the remonstrances of your petitioner, from the fifteenth of July, 1861, to the eighteenth of June, 1868, when said plantation, and such portions of the other property which had not been lost and destroyed, were returned to your petitioner. And your petitioner further represents that the said suit, which said defendant had instituted against Manuel Julian de Lizardi, was finally decided against said New Orleans Canal and Banking Company by the Supreme Court, as will more fully appear, together with other necessary particulars from the decree of the Supreme Court, which has been filed in this court, to which reference is made as part of this petition. And your petitioner further represents that the damage and injury suffered and sustained by the illegal attachment and seizure of the property of your petitioner, during the period aforesaid, amounted to the aforesaid sum of eight hundred and seventy-five thousand five hundred and eighteen dollars ninety-three cents, as will more fully appear, together with the details and specifications of the items of said damage and injury made part of this petition. And your petitioner further represents, that when said New Orleans Canal and Banking Company obtained said order of attachment, Effingham Lawrence, Esq., became the security on the attachment bond on file in said suit, and that said Lawrence is liable *in solido*, with the New Orleans Canal and Banking Company, to the extent of the amount of said bond for the damage herein claimed. And your petitioner further represents that the amount of the crops in the specification of the damages sustained by him, by the illegal acts and doings of the defendant aforesaid, could and would have been made on said plantation if it had not been illegally attached and seized during the period aforesaid; that although amicably demanded, the defendant has neglected and refused to pay said debt.

The answer was a general denial and a prayer for a trial by jury. Subsequently the plea of prescription of one and three years was filed.

The jury rendered a verdict in favor of the plaintiff for one hundred and eighty-five thousand dollars, and the defendant appealed.

The first question to be decided is, from what does the obligation sued upon spring?

The plaintiff contends that it arises *ex quasi contractu negotiorum*

gestorum ; while the defendant insists that it arose *ex delicto* or *ex quasi delicto*.

The allegations of the plaintiff are that his property was illegally seized and taken out of his possession by the sheriff, at the instance of the defendant, under an attachment against a third party, and that "the damage and injury suffered and sustained from the illegal attachment and seizure of his property during the period aforesaid amounted to the aforesaid sum."

It has often been decided by this court, that the seizure of A's property, under a writ against B is a *quasi* offense. *Delisle v. Morgan*, 2 N. S. 24 ; 6 R. 382, *Edwards v. Turner* ; 9 Mart. 624 ; 5 La. 39 ; 9 An. 490 ; C. C., articles 2315, 2316.

The action based upon an obligation springing from a *quasi* offense is prescribed by one year. C. C., article 3536 ; 20 An. 151, 214, 323.

The learned counsel for the plaintiff insists, however, that even if the source of the obligation incurred by the defendant be conceded to have been a *quasi* offense, the wrongful attachment of the plaintiff's property, still the prescription should not begin to run until the end of the wrongful act, for until then the amount of the damages done by the continuing attachment could not have been known ; and he refers to the case of *Mestier v. The New Orleans, Opelousas and Great Western Railroad Company*, 16 An. 354, in support of that position.

We concede that there is good reason why the law regulating prescription in such cases ought to be as the counsel contends that it is. But we have no right to alter the positive provision of the code, which declares that prescription runs from the day on which the injury or damage was sustained. C. C. 3637. And that is what is maintained in the case of *Mestier*, quoted by plaintiff, as we understand that case.

We think the prescription of one year should be maintained against the portions of the demand of the plaintiff, which arose one year before the institution of this suit.

But it is incumbent upon the party pleading prescription to show what portion of the damages proved occurred anterior to the year preceding the institution of the suit, or, in other words, to prove what part of the plaintiffs' demand is prescribed.

The evidence shows that the plantation of the plaintiff was in first rate order when it was attached, and that it was in very bad order, when it was delivered to the plaintiff in July, 1868. That the ditches and draining canals were partially filled, the bridges rotten and the cabins, draining machines, etc., were greatly out of repair.

When questioned by the defendant, Mr. Pilie, a civil engineer, who made an estimate of the cost to repair the damages done on the plantation, answered that the bridges had not suddenly become rotten, nor had the ditches and canals suddenly been filled ; that the ditches and

De Lizardi v. The New Orleans Canal and Banking Company.

canals had been filled in "about twelve or eighteen months" and the bridges and cabins had got in their damaged conditions in about two years. This does not enable us to say what part of the damages occurred more than a year before the suit. The same remark is applicable to the injury done to the draining machine and other machinery on the place. The evidence shows that the stable was blown down by a storm, and more than a year before this suit was filed.

The defendant is not responsible for the destruction of the stable, nor for the fruits of the plantation, except for the last year preceding the institution of this suit. The defendant is responsible for the injury done to the plantation, which he has failed to prove occurred more than a year before the suit, and for the rent of the plantation for the last year the plaintiff was deprived of his property.

In fixing the rents of the plantation, we adopt the highest estimate which the evidence will permit us to adopt, as the property was tortiously taken from the possession of the plaintiff, to wit: \$10,000; and we estimate the damages to the plantation, in the filling up of the ditches and draining canals, the destruction of bridges, injury to cabins, etc., at \$19,511 48.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the lower court be annulled, and that there be judgment in favor of the plaintiff against the defendant, the New Orleans Canal and Banking Company, for the sum of \$29,511 58, with five per cent. per annum interest from seventeenth January, 1870, and costs of the lower court. It is further ordered that the costs of appeal be paid by appellee.

Rehearing refused.

Mr. Justice Morgan took no part in this case.

No. 4104.

STATE OF LOUISIANA v. JULIUS SOCHA.

Where the appellant referred to the written reasons of the judge *a quo* in refusing a new trial, for the facts in regard to the qualifications of a juror and the time at which appellant alleged he became aware of said facts;

Held—That it does not appear that timely objection was raised, or a bill of exceptions reserved on this point, or an assignment of errors made on the record. The only mode of bringing the facts of a criminal cause in this respect before this court, is by bill of exceptions.

This court is not authorized to refer to the reasoning of the judge *a quo* for the facts. Errors of law in a motion for a new trial can be reviewed here, but not the facts.

APPEAL from the First District Court, parish of Orleans. *Abell, J.* Criminal case. *Simeon Belden*, Attorney General, for the State. *Castellanos & Gastinel*, for appellant.

HOWELL, J. The defendant has appealed from a judgment con-

demning him to pay a fine of five hundred dollars and forfeit his license upon the charge of keeping a disorderly ale and tippling house.

The error, as alleged, which he brings to our notice is a point made in a motion for a new trial, that "one H. Stackhouse, a juror empaneled in this case, was not a registered voter and was not qualified to sit as a juror upon the trial of this cause."

It does not appear that timely objection was made or a bill of exceptions reserved on this point; nor is there an assignment of errors in the record. The appellant however refers us to the written reasons of the judge *a quo* for refusing the new trial, for the facts in regard to the qualifications of said juror and the time at which appellant alleges he became aware of such facts. It has often been held that the only mode of bringing the facts of a criminal cause in this respect, before this court, is by bills of exceptions; we are not authorized to refer to the reasoning of the judge for the facts. Errors of law in a motion for a new trial can be reviewed by us, but not the facts.

Judgment affirmed.

Rehearing refused.

No. 2967.

A. TORRE & CO. v. THIELE, SEILER & CO.

The sale by an agent after the owner had sold the property conferred no title. The power to sell was impliedly revoked by the owner's sale. In this case no damage is shown to have been done to the plaintiffs. They had not paid for the price, and within an hour or two after the agreement to sell to them, they were informed that the property had been previously sold by the owner and for less than they had agreed to give.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Roselius & Philips*, for plaintiffs and appellees. *T. Gilmore & Sons*, for defendants and appellants.

LUDELING, C. J. This suit was originally instituted to enforce the specific performance of the following contract of sale :

"Sold to A. Torre & Co. cargo of fruit per schooner Village Belle from Utila, about 2000 cocoanuts, 750 bunches bananas and 8800 plantains, for the round sum of two thousand dollars currency, cash. New Orleans, twenty-sixth of April, 1867."

An order of sequestration issued and was set aside by defendants bonding the fruits, whereupon the plaintiffs filed an amended petition asking for damages instead of a specific performance of the contract.

The evidence satisfies us that the above sale was made by an agent after the fruits had been sold to Tramontana by Seiler himself. Clearly the sale by the agent, after the owner had sold the fruits conferred no title. The power to sell was impliedly revoked by the sale made by the owner. Story on Agency, section 500. Nor is there any damage

Torre & Co. v. Thiele, Seller & Co.

shown to have been done to the plaintiff. He had not paid the price, and within an hour or two after the agreement to sell to him, he was informed that the fruits had been previously sold by the owner, and for less than he had agreed to give. The judgment in favor of the plaintiff is therefore erroneous.

It is ordered and adjudged that the judgment of the lower court be reversed, and that there be judgment in favor of the defendants, rejecting the plaintiffs' demand with costs of both courts.

No. 2890.

AUGUSTUS BOHN v. CAPTAIN CLEAVER AND LINDSEY, Master and Owner of British steamship Robert Lowe.

If it be conceded that a contract was violated willfully, or through carelessness, still the measure of damages would be the injury inflicted upon the plaintiff, where there is no *penal* clause in the contract.

Damages arising from the presumable profits of a speculation that was never made, are too uncertain for a court of justice to award.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Howe & Prentiss, Randolph, Singleton & Browne*, for defendants and appellants. *D. C. Labatt*, for plaintiff and appellee.

LUDELING, C. J. This suit is for damages for the violation of a contract of affreightment. The conclusion we have come to on the question of damages, after a careful examination of the evidence, renders it unnecessary for us to decide any other question discussed by counsel. If it be conceded that the contract was violated willfully, or through carelessness, still the measure of damages would be the injury inflicted upon the plaintiff, for there is no penal clause in the contract. It is as follows:

“August Bohn, Esq.:

“We offer you the British auxiliary steamship Robert Lowe, about twelve hundred and seventy-seven tons register, for a full cargo of cotton, privilege Liverpool or Havre, at three-quarters pence three farthings for the former, or seven-eighths pence latter, with five per cent. primage, invoice weight, steamer free of commissions, here or in Liverpool or Havre; thirty days to be allowed for loading at the port, and steamship to be ready to receive cargo not later than the fifteenth of October.

“HUNTER & CO.

“Accepted.

“P. p. AUG. BOHN.

“R. W. SIMPSON.”

It appears that the Robert Lowe arrived at the bar at the mouth of the Mississippi river on the thirtieth September, but she did not reach New Orleans until about the twentieth of October, four or five days

Bohn v. Cleaver and Lindsey, Master and Owner of British steamship Robert Lowe.

after the time when she should have been there, in accordance with the terms of the contract. Freights declined from the fifteenth of October, 1869, steadily, until the end of November. So far as shipping the plaintiff's own cotton was concerned, this was a gain to him, and not a loss. So far as sub-letting the ship to other shippers was concerned, he did not make any such contract. He testified that he did not like to take the risk of making contracts, because he was apprehensive that the vessel would not be here in time. And for these speculations, which he thinks he might have made, but which he did not dare to make, he wishes the defendants to pay him \$16,000.

Damages arising from the presumable profits of a speculation that was never made are too uncertain for a court of justice to award.

The evidence shows that the Robert Lowe was at the bar on the thirtieth of September; that efforts were being made to get her over the bar, that these facts were known to the plaintiff; and that the Lowe actually reached the city only a few days after the time she was to be ready to load. It is further proved that she could have discharged her cargo and received her load in ten or twelve days. We are at a loss to see how the plaintiff has been injured. But he stands upon his bond, and demands his pound of flesh. We award him everything that is in the bond, but nothing that is not therein written.

It is therefore ordered and adjudged that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the defendants, rejecting the plaintiff's demand, with costs of both courts.

TALIAFERRO, J., *dissenting*. I think judgment should be rendered for plaintiff. This suit is brought on a charter party, drawn up as follows:

"Office of William Creevy, broker, steamship agent and commission merchant, 33 Carondelet street, New Orleans, September 25, 1869.

"Augustus Bohn, Esq.:

"Dear Sir—We offer you the British auxiliary steamship Robert Lowe, about 1277 tons register, for a full cargo of cotton, privilege Liverpool or Havre, at three-fourths pence three farthings for the former or seven-eighths pence latter, with five per cent. primage, invoice weight; steamer free of commission here or in Liverpool or Havre; thirty days to be allowed for loading at this port, and the steamer to be ready to receive cargo not later than the fifteenth day of October.

(Signed)

"HUNTER & CO.

"Accepted: AUG. BOHN.

(Signed)

"P. p. R. W. SIMPSON.

"Witness: (Signed) OLIVER P. REZEAN."

Internal revenue stamp \$10 affixed.

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The plaintiff alleges that the defendants failed to have the steamer ready in port to receive cargo on the fifteenth of October, according to their contract, and in consequence thereof he has suffered damages to the extent of \$16,049 37, which he alleges arise from the loss to him from being unable to load the ship at the stipulated time, when freights on cotton were ruling high in New Orleans, there being offered for Liverpool one penny and one-eighth sterling per pound, and none obtained; that that price was paid at that time for freight to Havre. He alleges that the difference between the rate agreed upon by the charter party and the prevailing rates in New Orleans on the fifteenth of October was three-eighths penny sterling per pound, which at the rate of exchange makes the sum claimed as damages.

The defendants deny that plaintiff has suffered loss from the unavoidable failure on their part to have the ship in the port of New Orleans on the fifteenth of October, which failure occurred from the low stage of water that rendered it impossible for the vessel to pass over the bar at the mouth of the Mississippi, and they plead *vis major*. They further allege that the steamship did reach the port of New Orleans and was ready to receive cargo on the twentieth of October, of which they gave plaintiff notice, but that he refused to accept and load her; that defendants had previously, on finding it impossible to get the ship in port by the fifteenth of October, offered to pay all extra expenses incurred in keeping the cotton until it could be received on the vessel, and guaranteed that the vessel would load and be ready to sail within the thirty days allowed for loading.

There was judgment in the court below in favor of the plaintiff for \$8024 67, with interest at five per cent. from judicial demand.

The defendants have appealed.

The defendants' counsel holds that the contract between the parties is a Louisiana contract; that it was made in Louisiana; was to be performed in Louisiana as to all matters at issue, and that both the jurisprudence and the statutes agree in laying down the rule that such a contract is controlled in every respect by the laws of Louisiana. The contract was entered into in Louisiana, but it seems its accomplishment was to take place in a foreign country. The undertaking of the owners of the vessel was to bring her to New Orleans by the fifteenth of October, to be loaded with cotton by the plaintiff, and she was thence to proceed to the port of delivery (Liverpool or Havre at the option of the shipper), the owners to be paid for their services at a fixed price per pound for the freight of the cotton. The inception of the contract took place in New Orleans, but the parties looked to its fulfillment in Europe, where the delivery of the cargo was to take place.

“ An instrument as to its form and the formalities attending its exe-

Bohn v. Cleaver and Lindsey, Master and Owner of British steamship Robert Lowe.

cution must be tested by the laws of the place where it is made ; but the laws and usages of the place where the obligation of which it is the evidence, is to be fulfilled, must regulate the performance." 11 Martin 25, 8 N. S. 34, Civil Code, article 10, 2 An. 774.

The commercial and maritime law should therefore govern as to the fulfillment of this contract of affreightment.

The plea of *vis major*, or overpowering force, alleged by defendants as releasing them from the performance of the obligation they entered into to have the vessel ready in the port of New Orleans on the fifteenth of October, to receive cargo, I think should not avail them. That the impediment of the bar at the mouth of the river and the low stage of water at the time, did not present an obstacle absolutely impossible to be overcome by defendants, seems apparent from the fact that on the nineteenth or twentieth of the month they did surmount the obstacle by resorting to lighterage and the additional motive power of several steam tugs. By this means the vessel was taken over the bar and she came at once into port. It is in proof that the Robert Lowe arrived at the bar on the thirtieth of September, and there remained until after the fifteenth of October, the day she was to be at New Orleans to receive cargo. During all this time no attempt was made to put in requisition the appliances by which she finally came over the bar and reached the city. The difficulties in the way of entering the Mississippi arising from that *opprobrium scientiae*, the bar lying at its entrance into the gulf, are well known, and the defendants in their contract made no exception on account of those difficulties. They obligated themselves unconditionally to bring their steamer to New Orleans and be ready to receive cargo not later than the fifteenth of October. The untoward state of things which they found on arriving at the mouth of the river forms no ground for relief against their absolute and unqualified undertaking that their vessel should arrive at New Orleans at the time fixed. The rule is one of common acceptance that in general a charter party operates as a contract of insurance as well as of affreightment where no exception is introduced.

In the case of the Harriman, 9 Wallace, p. 172, the facts were, that a vessel was chartered in San Francisco to carry coal to the Spanish fleet, supposed to be then operating against Valparaiso; and the chartered vessel sailed from San Francisco on May 22, and it turned out that two days afterward the Spanish fleet left the coast of Chili and went to parts unknown, and did not return there. The chartered ship proceeded to the Chinca Islands, where it was ascertained that all was quiet at Valparaiso, and that nothing was known of the Spanish fleet. The ship returned to San Francisco, without going beyond the Chinca Islands. The Supreme Court of the United States, in regard to the main issue in that case, said: "The owner made no provision against

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any contingency. His engagement was simple, direct, and unconditional, that the vessel should proceed to Valparaiso. The presence or absence of the consignee was immaterial. If absent, it was the right and duty of the master to place the cargo in store. The contract was not fulfilled. For this the shipper is in no wise responsible. Such are the relations of the parties. The contract of affreightment is governed by the same principles as other special contracts. There are none to which these principles are more stringently applied. The contract is an entirety; and where there has been no complete fulfillment on one side and no fault or waiver on the other, no freight money can be recovered. Mr. Justice Story says this is the result of all the cases." The court further said: "The principle deducible from the authorities is, that if what is agreed to be done is possible and lawful, it must be done. Difficulty or impossibility of accomplishing the undertaking will not avail the defendant. It must be shown that the thing can not by any means be effected. Nothing short of this will excuse non-performance. The answer to the objection of hardship is, that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts, not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

I think the plaintiff has made out clearly a loss to the amount of the sum awarded him by the judgment of the lower court. The defendants had chartered their ship to carry cotton to Liverpool for seven-eighths pence per pound. The plaintiff had the right on paying that rate to load the ship at a higher rate if he could get it. Early in October, Decan & Zerega, ship brokers, offered to the plaintiff for the Lowe two thousand bales at fifteen-sixteenths pence per pound, which he declined, under the apprehension that the Lowe would not arrive on the fifteenth. The plaintiff, about the same time he was offered the two thousand bales by Decan & Zerega, endeavored through those brokers to ship a thousand bales of his own cotton on the Alhambra at two cents per pound, but could not effect the shipment because the Alhambra was loading at two and a-half cents per pound. I am satisfied that the evidence is conclusive that the Lowe could have been readily loaded at fifteen-sixteenths pence per pound had she been in port at the stipulated time.

It is shown that freights just at that time were ruling high, even a penny or more, it seems, had been offered in some instances. When the plaintiff offered a thousand bales to the Alhambra, she was the only steamship in port. The number of bales the Lowe was capable of carrying is shown, and I think the estimate made by the court *a qua* of the difference between the contract price by the charter party and what is assumed as the average rate of freights on the fifteenth of

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October, viz., a penny and one-sixteenth, correct. To this is added five per cent. primage, the whole reduced to United States currency at the rate of exchange at New Orleans on England on the fifteenth of October, 1869, making \$8024 67. For this sum, with five per cent. interest from judicial demand, the judgment was rendered, and, I think, correctly.

MORGAN, J. I concur with Mr. Justice Taliaferro in his dissenting opinion.

Rehearing refused.

No. 4522.

AMOS T. DWIGHT v. R. R. BARROW.

The motion to dismiss the appeal must prevail, where the appellant has lost his right to the suspensive appeal by failing to furnish the required bond within the time prescribed by law, and where the amount of bond not having been fixed by the judge, he can not avail himself of a devolutive appeal.

APPEAL from the Third (now Fifteenth) Judicial District Court, parish of Terrebonne. *Louis West*, judge *ad hoc.*, in place of the district judge recused. *N. H. Rightor*, for plaintiff and appellee. *R. D. Jordan*, for defendant and appellant.

ON MOTION TO DISMISS.

TALIAFERRO, J. The ground taken for the dismissal of this appeal is, that the appeal bond was not given until the twenty-eighth day of January, 1873, the day on which the appeal was by law returnable, being the fourth Monday of that month, the appeal having been granted on motion in open court on the twentieth of November, 1872. The transcript was filed in this court on the fifth of February, 1873, the appellant, upon the certificate of the clerk of the lower court of his inability to complete the transcript within the time required by law, obtained, on the twenty-third of January, an extension of ten days to complete it, and on the thirty-first of that month, on motion, a further extension of five days was granted. The motion must prevail. The appellant clearly lost his right to the suspensive appeal by failing to furnish the required bond within the time required by law. The amount of bond not having been fixed by the judge, he can not avail himself of a devolutive appeal. C. P. article 578.

It is ordered that the appeal be dismissed at appellant's cost.

No. 4536.

FRANCES DESOBRY et als. v. ROMAN SCHLATER et als.

Parties to a marriage contract in Louisiana can agree therein, that the property they may acquire by succession or donation during marriage, shall fall into the community of acquets and gains, and the father and mother of the parties to the marriage can give, for the benefit of said parties, the whole or a part of the property they may have on the day of their decease.

Parties may stipulate as they like, provided the thing stipulated is not in contravention of a prohibitory law. Any stipulation, therefore, in a marriage contract, which is not in violation of a prohibitory law, is binding upon the contracting parties, as long as the contract lasts.

All stipulations which the law permits to be made in marriage contracts may be altered by the husband and wife jointly before the celebration of the marriage, but not afterwards. As they bind themselves at the time of the marriage, so they remain bound so long as the marriage lasts.

Whether the stipulations of a marriage contract can be subsequently changed or not, it is clear that the changing of said contract would be, in reality, a new one, and that, as such, it would have to be entered into by all those who were parties to the first contract, and that the stipulations to that effect should be positively stated.

The fruits of community property belong to the community and are liable to seizure in payment of a community debt.

Plaintiffs having pleaded the prescription of one year against the defendants' answer and pretensions ;

Held—That it does not appear that this case is governed by any of the provisions of the article of the code regulating said prescription.

A PPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. A. & E. B. Talbot, David H. Barrow, C. Roselius and Alf. Philips*, for plaintiffs and appellees. *Samuel Matthews, George Wailes and William H. Hunt*, for defendants and appellants.

MORGAN, J. On the sixteenth December, 1846, Jean Arvillien Dardenne and Frances Desobry, entered into a marriage contract, by which it was stipulated that the future husband brought into marriage property valued at \$18,000, and the future wife \$7500 in cash, which sum was advanced by her father and mother out of the share which might fall to her in their succession after their death. This sum of \$7500 was acknowledged to have been received by the future husband. Besides the cash, the future wife also brought into marriage a slave, aged about eighteen years, which was also advanced by her father and mother upon the same terms. The parties to this contract were Dardenne and Frances Desobry, and her father and mother, Lewis and Minerva Desobry.

By this contract it was further agreed that all the property brought by the future husband and wife in marriage, or which might fall to them or either of them by succession or donation during their marriage, should be held in common between them under a title similar to that of acquets and gains, made during the existence of the marriage ; and it was expressly agreed between the parties to the contract, that the future wife had not, and should never exercise any dotal or paraphernal rights. This portion of the contract is as follows :

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“Article third—The parties to this contract, that is to say, the said Jean Arvillien Dardenne and the said Frances Desobry and her said father and mother, Louis Desobry and Minerva, his wife, covenant and agree that all the property brought by them in marriage, or which may fall to them, or either of them, by succession or donation, during their marriage, shall be held by them in common, on a title similar to that of acquets and gains, made during the existence of the marriage, it being expressly understood by and between the parties to this contract that the said future wife has not, and can never exercise any dotal or paraphernal rights.

Dardenne and Frances Desobry were married under this contract.

At various times after the marriage the father and mother of Mrs. Dardenne gave to Dardenne sums of money. They also gave him a slave. He receipted for the amounts received, and it was stated in the receipts that the money and the slave given were received as donations to Mrs. Dardenne, to be deducted out of any interest which she might eventually have in the succession of her father and mother.

On the twenty-fourth March, 1856, Louis Desobry, Mrs. Dardenne's father, sold to Dardenne certain pieces of property for \$10,150, of which \$2000 were paid in cash, and for the balance the vendor made a donation thereof to his daughter, Mrs. Dardenne, as an advance of her share of inheritance, which sum, so advanced, was to be considered as the paraphernal property of Mrs. Dardenne. On the fifth September, 1866, Mrs. Dardenne instituted suit against her husband, in which she sets up the marriage contract referred to, and the payments made therein and thereunder, all of which payments she avers were received by her husband, and were by him converted to his own use and benefit. She alleges further that the stipulations therein contained, with reference to the community which it was agreed should exist between her husband and herself, are contrary to law, and are therefore null and void; that the derangement of her husband's affairs and his pecuniary embarrassments induce her to fear that she may lose her rights and claims for the sums of money and the property received by him for her; and she prayed for a separation of property, and for a judgment for the amount of her claims, with interest, and with a legal mortgage to secure the payment thereof upon her husband's property. The husband made default, which was duly confirmed, and on the twenty-eighth September, 1866, judgment was rendered in her favor, declaring that portion of their marriage contract regarding the community which was to exist between them null; decreeing, further, a separation of property between her husband and herself, and giving her a judgment for \$19,641, amount of her separate and paraphernal funds and moneys received by her husband for her account, with legal interest from judicial demand until paid, and granting her a legal mortgage on the

property of her husband to secure the payment of the \$19,641, to date from the dates upon which the several sums making up this aggregate were received by him. This judgment was published according to law.

On the first March, 1867, by public act passed before the recorder of the parish in which they reside, Dardenne, in full satisfaction of the judgment above recited, gave to his wife, who accepted the same under his authorization, a certain plantation known as the Crescent plantation, together with the mules, horses, sheep, and agricultural implements thereon, and another tract of land. This *dation en paiement* was recorded on the twenty-first March, 1867. On the thirteenth February, 1867, Mrs. Dardenne gave to her husband a power of attorney, to manage all the matters regarding her property, and he has been administering it ever since. The Crescent plantation has been cultivated by him, and in the year 1871 a crop of sugar and molasses was made thereon.

On the twenty-eighth September, 1866, Roman Schlater obtained a judgment against Brusle and Dardenne, *in solido*, for \$9504, with four per cent. interest thereon per annum, from first April, 1862. On the seventh December, 1871, he issued execution thereon. On the eighth December, the sheriff seized six hogsheads sugar, and on the fifteenth he seized twenty-six and two-thirds hogsheads and three thousand seven hundred and forty-five gallons molasses, more or less, of which he subsequently released one-third of the sugar and two thousand eight hundred gallons of molasses, under instructions from Schlater, which sugar and molasses was produced on the Crescent plantation.

This execution was enjoined by the plaintiff herein. In her petition she sets up her judgment, the payment thereof by the transfer of property above set forth, amongst which was the Crescent plantation, of which she alleges continual possession since the transfer thereof; and she claims that the property seized belongs to her, and that it is not liable for her husband's debts. She asks for a judgment decreeing the seizure illegal.

The defendant answers that plaintiffs' judgment and the proceedings thereunder, are mere simulations, intended to place the property of her husband beyond the pursuit of his creditors, who had obtained and recorded judgments against him prior to her judgment, and the transfer thereunder. He sets up the marriage contract between the parties, on the faith of which, he alleges, he and others, transacted business with her husband and became his creditors, and he claims that her judgment as against him is an absolute nullity. Upon these issues the parties went to trial. There was judgment perpetuating the injunction, and the defendant has appealed. The whole case turns upon the validity of the marriage contract, about the existence and confection of

which there is no dispute; and the question propounded to us for answer is: Can parties, in Louisiana, by their marriage contract, agree that the property which they may acquire by succession, or donation, during marriage, shall fall into the community of acquets and gains? And herein (in this case) can the father and mother of the parties to the marriage, give the whole or a part of the property they may leave on the day of their decease for the benefit of the parties?

If they can, the judgment appealed from is wrong. If they can not, it is right.

Our law considers marriage in no other view than as a civil contract. C. C. 86. Parties may stipulate as they like, provided the thing stipulated is not in contravention of a prohibitory law. Any stipulation, therefore, in a marriage contract, which is not in violation of a prohibitory law, is binding upon the contracting parties, so long as the contract lasts.

Every marriage contracted in this State superinduces, of right, partnership, or community of acquets and gains, if there be no stipulation to the contrary. C. C. 2399.

Parties may, by their marriage contracts, modify the legal community as they think fit, either by agreeing that the parties shall be unequal, or if specifying the property belonging to either of them, of which the fruits shall not enter into the partnership. C. C. 2424.

They may stipulate that there shall be no community whatever. C. C. 2332. In other words, in our opinion, as we have before stated, they may make any stipulation in their contract which is not reprobated by law.

And "fathers and mothers, the other ascendants, the collateral relations of either parties to the marriage, and even strangers, may give the whole or a part of the property they shall leave on the day of their decease, both for the benefit of the parties and for that of the children to be born of their marriage, in case the donor survives the donee." C. C. 1735.

These are all stipulations which the law permits to be made in marriage contracts, which agreements may be altered by the husband and wife jointly before the celebration of marriage, but not afterward. Article 2329 declares, "Every matrimonial agreement can be altered by the husband and wife jointly, before the celebration of marriage, but it cannot be altered after the celebration." As they bind themselves at the time of their marriage, so they remain bound so long as the marriage lasts.

These are the textual provisions of our Code, and we do not see how those who follow them can successfully assert that they have been acting in conflict with the law, or that a contract made under them is null and of no effect. This question has, we think, already been re

viewed by this court. In the case of *Fabre v. Sparks*, 12 R. 31, it was stipulated in the marriage contract that "there shall be a community between them, the said parties, which shall comprehend all their estate, real and personal and to come." The court gave effect to the contract; and so it did in the succession of *Mossy*, 4 An. p. 339, where the same doctrine was recognized.

It was contended that, notwithstanding the stipulation to the contrary in the marriage contract, donations may be made to the wife which will be her separate property. And it was pressed upon us that inasmuch as the donations in this case were made by the father and mother, on account of the plaintiff's interest in his and his wife's succession, which appears by the testimony of the father, by the receipts of the husband, and by the act of sale and donation of certain landed property, in which it is stated that the amount of the purchase money advanced is to be considered as the paraphernal property of the plaintiff, these advances must be held to be her paraphernal property, subject to restitution by her husband.

We do not consider the question whether, notwithstanding the stipulation to the contrary in a marriage contract, the wife may receive donations which will be her separate property before us. Such a stipulation may have been a condition precedent to the marriage. It is a condition which the law does not prohibit parties from making. It is a stipulation which the law expressly allows fathers, mothers, collaterals and even strangers to make in favor of their children, relatives or friends, so far at least as relates to the property which the donors may leave at their death.

Whether this contract, once made, can be annulled by the parties who made it, in spite of the article of the code, or whether one of the parties, without the assent of the other may destroy it, is not for us now to determine. We are clear, however, upon this point, that the changing of such a contract would be, in reality, a new contract, and that, as such, it would have to be entered into by all those who were parties to the first contract, and that the stipulations to that effect should be positively stated. We do not discover that this has been done here. The husband, the wife and her father and mother, before the marriage, agreed amongst themselves that all property received by donation by either of the parties contracting marriage, during the marriage, should be community property.

Plaintiffs' father was, as we have seen, a party to that contract, and when he made the donations to her, giving the same to her husband, without referring in any manner to the stipulations in the marriage contract, he must, we think, be considered as having done so, with reference to that contract, by which he knew his donation would form part of the community between his daughter and her husband. We

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think we must take his deeds to be a compliance with his words, and that when he declared the donations made by him to his daughter's husband should be considered as her paraphernal rights, his only object was to provide that the amounts should be deducted from his succession when it should come to be divided amongst his co-heirs. Otherwise, we think, he should have stated it, and the husband should have so accepted it, that the donations were to be her separate property, notwithstanding the marriage contract. At all events, we think it should have been in some way shown that it was their intention to destroy or modify the marriage contract. This was not done. On the contrary, to us, the donations seem to have been made in conformity therewith.

The marriage contract not having been abrogated when the donations and sale were made, the property conveyed formed part of the community of acquets and gains, and was liable for the community debts. The judgment under which the execution herein enjoined issued, was to force the payment of a community debt, which existed when the judgment under which the plaintiff now claims, was rendered. The property being community property, the fruits thereof belong to the community, and are liable to seizure in payment of a community debt, and the injunction which restrains the execution under which it was seized therefor, improperly issued.

Plaintiff has plead the prescription of one year against the defendants' answer and pretensions. We do not see that the case is governed by any of the provisions of the article of the code regulating the prescription of one year.

It is therefore ordered, adjudged and decreed that the judgment of the district court be avoided, annulled and reversed, and that the injunction herein issued be dismissed, plaintiffs to pay costs in both courts.

Rehearing refused.

No. 4352.

SUCCESSION OF HENRY J. FORSTALL, on Opposition of Oscar Forstall to Application of Widow Forstall for Letters of Tutorship.

Nothing is to be found in the statutes of this State relative to adoption, which, being construed with the various articles of the Civil Code on the subject of tutorship, inclines this court to believe that the Legislature, in permitting the adoption of children, had any intention to abridge the right of a natural tutor to the personal care and control of his minor child or to the administration of the child's property.

A PPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. O. T. Bemiss & Berault*, for Oscar Forstall, opponent and appellant. *Saucier & Michinard*, for Widow Forstall, appellee.

TALIAFERRO, J. Henry J. Forstall died in August, 1862, leaving one child, issue of his marriage with Mathilde Ranche, who in this suit

25	430
48	548

25	430
120	55

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petitions to qualify as natural tutrix of that child, Marie Emma Forstall; that an undertutor be appointed, and an inventory be taken of the property of the estate of her deceased husband.

She is opposed in these proceedings by Oscar Forstall, a brother of the deceased, on the ground that in compliance with all the requirements of law in such cases, and with the full consent of Mrs. Mathilde Forstall, widow of his deceased brother and mother of his surviving child, the said Marie Emma, he did by notarial act on the twenty-fourth of March, 1866, and in pursuance of a decree of the Fourth District Court of New Orleans, rendered on the tenth of March, 1866, adopt the said child Emma as his own. He prays to be recognized and confirmed as the adopted father of the child and entitled to the administration of her property, and that the application of Mrs. Forstall to qualify as natural tutrix of the minor be rejected.

The opposition was overruled, and an order rendered for the making of an inventory as prayed for by Mrs. Forstall, and she was recognized as natural tutrix of her minor child and allowed to qualify as such.

From this judgment the opponent has appealed.

We find nothing in the statutes of this State relative to adoption, construed with the various articles of the Civil Code on the subject of tutorship that inclines us to believe that the Legislature, in permitting the adoption of children, had any intention to abridge the right of a natural tutor to the personal care and control of his minor child, or to the administration of the child's property.

The judgment appealed from we think was correctly rendered, and it is therefore ordered that it be affirmed with costs.

 No. 4585.

SUCCESSION OF JEAN BOUVET, Opposition to Account of Tutrix.

The vendor's privilege attaches to the improvements put upon lots by the vendor, where the vendor is not opposed by any one entitled to or claiming a special privilege upon the buildings.

The objection that a widow claiming the benefit of the one thousand dollar reservation has lost her right to it by failing to register her claim as a privilege is without force. This provision for destitute widows and orphans is not to be regarded strictly as a privilege, and the recording of it is not necessary for its preservation.

This claim must be paid in preference to all other debts, except for the vendor's privilege and expenses incurred in selling the property, and where it conflicts with the lessor's privilege the latter must yield.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Julien Michel* and *A. J. Villere*, for Mrs. Bouvet, tutrix and appellee. *E. Bermudez* and *A. Viarant*, for Mrs. Van Rooten, opponent and appellee. *G. Schmidt*, for Mrs. Gallier, opponent and appellant.

TALIAFERRO, J. The widow of Jean Bouvet and natural tutrix of her minor children, having filed an account and tableau of distribution

of the proceeds of the insolvent estate of the decedent, it was opposed by various creditors, and a contest arose among them in regard to the rank that should be assigned to the claims of the contestants against the succession.

The funds to be distributed were proceeds of real estate amounting to \$1340 and \$1079 20, arising from sale of contents of a store leased by Mrs. Gallier to Bouvet (\$806 05), and \$273 15, amount of bills collected by the tutrix.

The judge *a quo*, after hearing the parties, made an alteration of the tableau as presented, and adjusted the distribution as follows: After deducting from the gross sum of proceeds of the real estate the taxes, and the various expenses of the sale, amounting in the whole to \$220, the remainder, \$1120, was given to Mrs. Van Rooten, holding mortgage and vendor's privilege on the property sold by her to Bouvet; to Mrs. Bouvet, claiming a thousand dollars under the law granting this right to a widow left in necessitous circumstances, after deducting from a thousand dollars the value of the household furniture retained by the widow, \$354. He directed the remainder, \$646, to be paid out of the \$1079 20, leaving a balance of \$433 to Mrs. Gallier, in right of her lessor's privilege.

From this judgment she appeals. In this court the widow Bouvet and several others, claiming to be privileged creditors, appear and join Mrs. Gallier in the appeal, and pray a reversal of the judgment and for the homologation of the two accounts as originally presented in the lower court.

The real estate belonging to the succession of the insolvent consisted of two vacant or unimproved lots in New Orleans, purchased by Bouvet from Mrs. Van Rooten, on a credit. A note was given for the price, and the vendor's privilege and special mortgage retained to secure the payment. Bouvet, after purchasing these lots, placed buildings and improvements upon them. An order of court was obtained for the appraisement of the lots and the improvements put upon them, separately, which was accordingly done, and the separate value of each ascertained, the value of the lots being \$600, that of the improvements \$900. The whole property sold together for \$1350. It is contended on the part of Mrs. Bouvet that the vendor's privilege does not extend to the improvements placed upon the lots; that as to the improvements, the vendor of the lots can have only a right of mortgage, and that under the homestead law her right is superior to the vendor's mortgage, as the law declares its precedence over all claims, except the vendor's privilege. We see no sufficient reasons for altering the judgment of the court below. We think the vendor's privilege attaches to the improvements put upon the lots by the vendee. The vendor in this case is not opposed by any one entitled to or

Succession of Bouvet.

claiming a special privilege upon the buildings. The objection that the widow claiming the benefit of the thousand dollar reservation has lost her right to it by failing to register her claim as a privilege, we think without force. We concur in opinion with the judge *a quo* that this provision made for the benefit of the destitute widow and helpless orphan is not to be regarded strictly as a privilege, and the recording of it is not necessary for its preservation. The terms used in conferring the right are very clear and distinct in declaring that the "amount shall be paid in preference to all other debts except those for the vendor's privilege and expenses incurred in selling the property." When, therefore, a case occurs like the present, where this claim conflicts with the lessor's privilege, the latter must yield. On the part of Mrs. Gallier, insisting upon her privilege as lessor, and those who joined her in this court in praying an alteration of the judgment, we find nothing to entitle them to it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

Rehearing refused.

No. 4660.

STATE OF LOUISIANA *ex rel.* J. O. NIXON *v.* JAMES GRAHAM, Auditor.
State of Louisiana, intervenor.

This court does not recognize the right of the Attorney General, whose term of office is about expiring, to make an agreement so as to preclude his successor from taking an appeal and otherwise discharging his duty to the State.

An Attorney General who palpably neglects his duty, and who abandons the interest of the State which he was charged to protect and to defend, has no authority to make contracts binding on his successor for a like dereliction of duty.

The Attorney General is not the State, but only its counsel. His agreement to acquiesce in a judgment is not the acquiescence of the State, nor does it bind a succeeding Attorney General not to take an appeal where the time for appealing has not elapsed.

The appellee is not entitled to notice of the order of appeal, where it was granted on the mandamus of this court, and relates back to the time the appeal was denied on the trial of the rule, contradictorily with the parties to the suit.

A statement of facts signed by the relator, "to facilitate the trial and to be used on the trial in the Supreme Court," would be sufficient to dispense with a citation of appeal on said relator.

The question on the merits presented in this suit is identical with the one decided in the case of the State *ex rel.* Salomon & Simpson against the same defendant, 23 An. 402.

The State debt exceeded the constitutional limitation of \$25,000,000 at the time the act for the relief of the relator was passed, and created a debt in his favor. His claim therefore can not be enforced.

A PPEAL from the Eighth District Court, parish of Orleans. *Cooley, J.*, acting in the absence of *H. C. Dibble*, judge of said court. *J. B. Howard* and *John Ray*, for relator and appellee. *Hays & New, J. Q. A. Fellows* and *A. P. Field*, Attorney General, for respondents and appellants.

WYLY, J. The plaintiff moves to dismiss this appeal :

State of Louisiana ex rel. Nixon v. Graham, Auditor. State of Louisiana, intervenor.

First—Because the judgment herein has been acquiesced in by S. Belden, Attorney General.

Second—Because the appellee has not been cited, the appeal being granted by motion on fifteenth March, 1873, at a term different from that at which the judgment was rendered, which was on eighteenth September, 1872.

Third—Because the State of Louisiana is neither a defendant nor an intervenor, and the Auditor has not given bond.

We do not recognize the right of the Attorney General, whose term of office is about expiring, to make an agreement not to take an appeal in a case, so as to preclude his successor from taking an appeal and otherwise discharging his duty to the State.

An Attorney General who palpably neglects his duty and who abandons the interest of the State, which he was charged to protect and to defend, has no authority to make contracts binding on his successor for a like dereliction of duty to the State.

The Attorney General is not the State; but only the counsel for the State. His agreement to acquiesce in a judgment is not the acquiescence of the State; nor does it bind a succeeding Attorney General not to take an appeal where he believes it the interest of the State to do so, and the time for appealing has not elapsed.

The rule for an appeal was tried contradictorily with the appellee, on second October, 1872, and the right to appeal was denied. The appellants applied for a mandamus and prohibition, and on tenth March, 1873, these writs were made peremptory and perpetual by this court, and the appeal has been brought up in pursuance thereof. We do not consider the appellee entitled to notice of the order of appeal, because it was granted on the mandamus of this court; and it relates back to the time the appeal was denied on the trial of the rule contradictorily with the parties to the suit. This court has only compelled the order which should have issued then.

Besides, the statement of facts signed by the relator and “to facilitate the trial and to be used on the trial in the Supreme Court,” would be sufficient to dispense with a citation of appeal. It is inconsistent and absurd for the relator to contend that he has no notice of this appeal, and at the same time to file a document signed by himself, for the purpose of facilitating the trial and to be used at the trial in the Supreme Court. A document of that character, voluntarily filed in the lower court, would be considered as a voluntary appearance, and would obviate the necessity for citation.

The third ground, that the State of Louisiana is neither a defendant nor an intervenor, was probably made in error. Because from the record it is positively untrue.

The Attorney General, in the same document, filed an answer for

State of Louisiana ex rel. Nixon v. Graham, Auditor. State of Louisiana, intervenor.

the Auditor and an intervention for the State; and the court entered the following order: "The intervention in this case is allowed by the court to be filed." And at the trial the minutes of the court show that the State by the Attorney General, appeared as an intervenor.

The motion is therefore denied.

ON THE MERITS.

The question presented is the same as that presented in *The State ex rel. Salomon & Simpson* against the same defendant, 23 An. 402. Indeed, it is the same claim, now in the hands of the original party, J. O. Nixon; it was then in the hands of Salomon & Simpson, the transferees of Nixon. How the claim can be stronger in the hands of the obligee or the beneficiary of the act No. 32 of the acts of 1871, than it was in the hands of his transferees, we can not imagine.

It is proved that the State debt exceeded \$25,000,000 at the time act No. 32, for the relief of J. O. Nixon, was passed. That act created a debt of over \$50,000 in favor of Nixon when the constitution prohibited the State from creating it, because the limit of \$25,000,000 had already been reached.

For the reasons stated and those given in *State ex rel. Salomon & Simpson v. James Graham, Auditor*, 23 An. 402, the judgment herein in favor of the relator must be reversed.

It is therefore ordered that the judgment appealed from be annulled; and it is further ordered that there be judgment for the intervenor, and that the mandamus herein be disallowed and the suit be dismissed at the costs of the relator in both courts.

Rehearing refused.

No. 2919.

ELLISON, CREEVY & EMLEY, liquidators of THE FIREMEN'S INSURANCE COMPANY, E. E. NORTON, assignee in bankruptcy (subrogated No. 23,616) v. JULES SCHNEIDER and EDWARD SCHNEGANS.

Where the question was as to the validity of the transfer of stock, on the ground that it was not made in accordance with the formalities required by the charter of the company; Held—That if the consent of the directors to the transfer was not obtained in a formal convocation of the board, yet the assent of a majority of the directors appeared to have been given and in the manner that transfers of stock were frequently made. This is sufficient.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Aug. De B. Hughes, Bentinck Egan, R. H. Marr, Cotton & Levy*, for plaintiff and appellee. *Hornor & Benedict*, for defendants and appellants.

TALIAFERRO, J. The plaintiffs, in their capacity of liquidators of the Firemen's Insurance Company, sue the defendants as stockholders

Ellison, Creevy & Emley v. Schneider and Schnegans.

in the company for the amount of two calls made on assessments according to the charter of the company; one of these assessments was made on the twenty-eighth of May, 1867, for twenty dollars per share; the other in July, 1869. After the company went into liquidation the liquidators made a call for twenty dollars per share to pay the debts of the company. After the call of the twenty-eighth of May, 1867, and before the one last made, Jules Schneider, one of the defendants, transferred his stock to Schnegans, the other defendant. The plaintiffs allege that this transfer to Schnegans was a mere scheme of Schneider to avoid his liability for the debts of the company as a stockholder; that the transfer was made to Schnegans without the formalities required by the charter to render valid the transfer of stock; and therefore the act purporting to transfer the stock of Schneider to Schnegans is null and void.

The defendants answer by general denial. The plaintiffs had judgment in their favor and the defendants have appealed.

We see no reasons for disturbing the judgment. The transfer complained of seems to have been regularly made upon the books of the company in the usual form of such transactions. Schnegans was recognized by the directors of the company as a stockholder, and by their consent became the transferee of the stock held by Schneider. This consent, if not obtained from the directors in a formal convocation of the board, yet the assent of a majority of the directors appears to have been given, and in the manner that transfers of stock were frequently made.

It is therefore ordered that the judgment of the District Court be annulled, avoided and reversed; it is further ordered that there be judgment in favor of the defendants, the plaintiffs paying costs in both court.

Rehearing refused.

No. 2920.

ELLISON, CREEVY & EMLEY, liquidators of FIREMEN'S INSURANCE COMPANY, No. 23,617, E. E. NORTON, assignee, (subrogated) v. LOUIS SCHNEIDER, LYDIA MARIA SCHNEIDER and EDWARD SCHNEGANS.

The syllabus of the preceding case, No. 2919, applies to this one, which is identical.

APPEAL from the Fourth District Court, parish of Orleans. *Théard, J. Aug. De B. Hughes, Bentinck Egan, Cotton & Levy*, for plaintiffs and appellees. *Hornor & Benedict*, for defendants and appellants.

TALIAFERRO, J. This suit is founded on the same basis with that of the same plaintiffs against Jules Schneider and Edward Schnegans,

Ellison, Creevy & Emley v. Schneider, Lydia Maria Schneider and Schnegans.

No. 23,616, the judgment in which has just been pronounced. For the reasons therein assigned, it is ordered that the judgment of the district court rendered in favor of the plaintiff's in this case (No. 23,617), be annulled, avoided and reversed. It is further ordered, that there be judgment in favor of the defendants, the plaintiffs paying costs in both courts.

Rehearing refused.

No. 3764.

DANIEL S. VINSON v. SUCCESSION OF JACKSON B. TOMPKINS.

Where, on the admission of the tutrix of a minor child, judgment was rendered declaring the sale of a certain piece of property to the minor's father, now deceased, to be simulated, and reconveying the title to the plaintiff, and condemning him to refund whatever taxes the widow paid, and to pay costs, reserving the rights of the minor, whatever they may be;

Held—That, although it is true the tutrix could make no admission which could bind the minor, yet that, as the law allows such suits and the proof of simulation by a *particular kind* of evidence, which, it seems, might have been, but was not adduced by plaintiff, he should be allowed an opportunity to furnish it, and not to rest under a cloud upon his title, which, it is probable from the facts in the record, could be removed, wherefore the portion of the judgment which "reserves the rights of the minor, whatever they may be," is reversed, and the case remanded for the purpose of allowing the plaintiff to introduce *legal* evidence as against said minor's rights, if any there be, to the property in question.

APPEAL from the thirteenth Judicial District Court, parish of Carroll. *Hough, J. M. Du Bose*, for plaintiff and appellant. *Ed. F. Newman*, for defendant and appellee.

HOWELL, J. The plaintiff alleges that having become embarrassed in his pecuniary affairs, and having had, for his own safety, to foreclose several mortgages held by him, among others one against A. M. Waddill, he caused the land of said Waddill, when sold by the sheriff, to be bid off by, and the title thereto, to put in the name of his nephew, Jackson B. Tompkins, with the understanding that so soon as the petitioner became unembarrassed, the said land should be reconveyed to him by the said Tompkins, who had no means and was merely interposed for the protection of the plaintiff. But before this was accomplished Tompkins died, and he now sues the widow and tutrix to have said title conveyed to him. The widow and tutrix answers that of her own knowledge she knows nothing of the alleged facts, except that her husband never had the amount of money for which the said land was bid off by him, and that he would have rendered any reasonable service to his uncle, the plaintiff, to help him through his temporary embarrassment, and so she admits the facts and offers no objections to the court rendering the judgment prayed for, but asked that plaintiff be ordered to refund the taxes paid by her.

Judgment was rendered declaring the sale to Tompkins to be simu-

lated and reconveying the title to plaintiff, and condemning him to refund whatever taxes the widow paid and to pay costs, reserving the rights of the minor, whatever they may be. The plaintiff appealed from that part of the judgment which reserved the rights of the minor.

It is true the tutrix could make no admission which could bind the minor, but as the law allows such suits, and the proof of simulation by a particular kind of evidence, which it seems may be, but was not adduced by the plaintiff, we have concluded to allow him an opportunity to furnish it, and not to force him to rest under a cloud upon his title, which it is probable from the facts in the record should be removed.

It is therefore ordered that the portion of the judgment herein which "reserves the rights of the minor Susie May, whatever they may be," be reversed, and this cause remanded to the lower court for the purpose of allowing the plaintiff to introduce legal evidence as against the said minor's rights, if any she have, to the property in question. Costs of appeal to be paid by the tutrix.

ON REHEARING.

HOWELL, J. Upon a re-examination of this case we see no reason for changing our views.

It is therefore ordered that the decree heretofore rendered by us remain undisturbed.

No. 4661.

JOHN M. HOYLE v. A. CAZABAT. JACOB, intervenor.

Where a note was paid by anticipation, the payment extinguished the mortgage which was given to secure it. It was an accessory to the contract, and fell when the debt was paid. Where it appeared that A borrowed a certain sum of money from B, with the avowed intention of discharging notes given to C, and with subrogation of C's rights of mortgage, but C was not a party to this act;

Held—That A had no authority in law to subrogate B to C's rights without C's knowledge or consent.

A PPEAL from the Fourth District Court, parish of Orleans. *Théard, J. C. T. Bemiss*, for plaintiff and appellee. *Julien A. Seghers*, for intervenor.

MORGAN, J. On the twenty-fourth August, 1869, the plaintiff sold to the defendant, Cazabat, a certain piece of real estate. The price of the property was \$4500, of which \$1500 was cash, and for the balance of \$3000 the defendant gave his three promissory notes, each for \$1000, payable one, two and three years from date, at the Mechanics' and Traders' Bank, in this city. The notes bore interest at the rate of eight per cent. from the day of sale, and the vendor reserved a mortgage and the vendor's privilege upon the property sold, to secure their

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Hoyle v. Cazabat.

payment. The notes were deposited for collection in the Mechanics' and Traders' Bank. The first note was paid about a month before it was due, although by whom it was paid does not appear, and the proceeds placed to the credit of the plaintiff, Hoyle.

The second note not having been paid at maturity, the plaintiff caused the property mortgaged to be seized and sold. Hoyle purchased it for \$3400. Being the vendor, he paid the costs and taxes upon the property in cash, and retained the balance in payment of the note upon which the order of seizure and sale issued, and to pay the note to become due; all of which, with the interest, costs, etc., more than consumed the amount of his bid.

After the sale, Jacob intervened, and, alleging himself to be the owner of the first note given by Cazabat, claimed to be paid his pro rata thereon from the price of the sale.

There was judgment against him and he has appealed.

The judgment is correct. The note he holds was paid—by anticipation, it is true—but it was paid, and payment of the note extinguished the mortgage which was given to secure it. It was an accessory to the contract, and fell when the debt was paid.

There is an act in the record by which it appears that Cazabat borrowed a certain sum of money from Jacob, with the avowed intention of discharging the notes given to Hoyle, and with subrogation to Hoyle's rights of mortgage, but Hoyle was not a party to this act, and we do not understand that Cazabat had any authority in law to subrogate Jacob to Hoyle's rights without Hoyle's knowledge or consent.

Judgment affirmed.

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TALIAFERRO, J., *dissenting*. In my opinion there is presented in this case an instance of the correctness of the rule which declares that where one of two innocent parties must sustain a loss it should fall upon the one by whose negligence or want of prudence the loss arose.

The bank was the agent of the plaintiff to collect the note. A person unknown to the teller of the bank presented himself one month before the note was due, and paid it in full, principal and interest, up to the time of its maturity. The teller, on receiving payment, delivered the note to this unknown person without placing upon it any cancel mark receipt or indication of any kind showing that it was paid. There was nothing upon the note in any manner calculated to cast suspicion upon its genuineness as a negotiable instrument. It was negotiated very soon after it was paid. Jacob, finding it to be a mortgage note, having nearly a month to run before it became due, and there being no circumstance that could have given rise in his mind to suspicion, or that was calculated to put a prudent man on his guard when he took it, advanced his money upon the faith of receiving a valid and sufficient security.

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Hoyle was the holder of this note of Cazabat's and of two other mortgage notes given to him by the wife of Cazabat for the price of property purchased by her. These two notes, with the one in relation to which this controversy has arisen, were transferred by Hoyle to Jacob with subrogation of mortgage rights. No attempt was made on the trial of the case in the court below to ascertain how Hoyle came by the note in question, or to show anything at all impugning his good faith, much less that of Jacob. The plaintiff seems to have rested satisfied that the note having been paid to him it was necessarily paid as to everybody else, acting upon the elementary principle that a debt is extinguished by payment. But, although this is true as between the maker and a *bona fide* holder, it is not always so as to others. And I think the authorities are to this effect.

Mr. Story, in his work on promissory notes, section 384, says: "Although as between the real *bona fide* holder and the maker the payment, whenever or however made, will be a conclusive discharge from the obligation of the note, yet as to third persons it may be far otherwise, for payment means payment in due course and not by anticipation. If, therefore, a promissory note is paid before it is due to any holder, and afterwards, and before its maturity, the same is passed to any subsequent *bona fide* holder the latter is still entitled to full payment thereof at its maturity, for payment of the note before it becomes due is no payment or extinguishment of the debt as to such persons." Parsons on Bills and Notes, volume 1, pp. 279, 280.

I think the judgment of the lower court should be reversed, and a judgment rendered in favor of the intervenor.

No. 4096.

STATE OF LOUISIANA ex rel. BOARD OF TRUSTEES OF STRAIGHT UNIVERSITY v. JAMES GRAHAM, Auditor.

The Straight University is not a public institution of learning in contemplation of article 140 of the State constitution.

A public institution of learning would be one which is controlled by the State through its agents, and in which the State would have a paramount interest and right of property, and which would depend upon the State for its existence.

The Straight University was incorporated under the general statutes of the State as a private corporation. It is controlled by a board of trustees, who are only responsible for their management to certain private individuals. The State, through its officers or otherwise, exercises no control or direction over the university, nor has it any voice as to the manner in which it shall be conducted. It is not therefore a public institution of learning, and the constitutional objection to the appropriation made by the Legislature in its favor must prevail.

A PPEAL from the Eighth District Court; parish of Orleans. *Dibble, J. John B. Howard, Roselius & Philips*, for relators. *S. Belden*, Attorney General, and *Hornor & Benedict*, for respondent.

TALIAFERRO, J. The relators applied to the Eighth District Court

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for a mandamus against the State Auditor, to compel him to issue to them warrants to the amount of \$35,000, that sum having been appropriated by the State in aid of the institution represented by them, but they allege that through the refusal of the Auditor to issue to them warrants upon the Treasurer for its payment they have been unable to obtain it. A rule *nisi* was granted, and the Auditor answered that the act of the Legislature appropriating \$35,000 to the Straight University is in violation of that article of the State constitution which forbids the Legislature to make appropriations for the support of any private school or any private institution of learning whatever, and he alleges the Straight University is a private institution of learning.

The rule was made absolute and a peremptory order rendered commanding the Auditor to issue the warrants as required by the relators. From this order an appeal was taken.

By the seventh section of the act of the General Assembly, approved on the ninth of March, 1870, numbered eighty-one, it is provided "that the sum of thirty-five thousand dollars be and the same is hereby appropriated to the 'Straight University' for the use of the medical department, to construct suitable buildings, and secure illustrations of medical science; and that the said sum be paid to the order of the Board of Trustees on the warrant of the Auditor of Public Accounts from the treasury of the State; *provided* [that in consideration of the] State aid rendered this department the faculty shall receive one indigent student from each parish free from charge for tuition, which obligation shall continue for ten years, said students to be nominated by the trustees of the university."

The relators aver that this appropriation was made in consideration of the agreement on their part to receive one indigent student from each parish of the State and furnish their tuition free; that they have received about thirty students of that class, and are willing and prepared to carry out the agreement on their part.

The President of the Board of Trustees was examined as a witness. He stated that the number of students in the university was over six hundred; that not more than thirty or thirty-five of these were indigent students; that all of them except the indigent ones pay their own expenses; that he regards the institution as self-sustaining; that donations have been made to it by individuals; that the appropriation made by the State was not intended to aid in founding the institution, but to aid it in erecting buildings and in procuring the needed philosophical apparatus.

The only question to be examined is one of fact. Is the Straight University a public institution of learning in contemplation of article one hundred and forty of the State constitution? A public institution of learning, it appears to us, would be one which is controlled by the

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State through its agents, and in which the State would have the paramount interest and right of property and which would depend for its existence upon the State.

In the celebrated case of *Dartmouth College v. Woodward*, 4 Wheaton's Reports, pages 635 to 638, Chief Justice Marshall said, in discussing the character of Dartmouth College: "Are the trustees and professors invested with any portion of political power, partaking in any degree in the administration of civil government and performing duties which flow from the sovereign authority? That education is an object of national concern and a proper spirit of legislation, all admit. That there may be an institution founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer? And do donations for the purpose of education necessarily become public property, so far as the will of the Legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered."

After a review of the charter of Dartmouth College, Judge Marshall proceeds:

"Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified object of that bounty; that its trustees or governors were originally named by the founder and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government, but a charity school, or a summary of education, incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation."

We conclude that the constitutional objection named in this case must prevail. The Straight University was incorporated under the general statutes of the State as a private corporation. It is controlled by a board of trustees who are only responsible for their management to certain private individuals. The State, through its officers or otherwise, exercises no control or direction over the university, nor has it any voice as to the manner in which it shall be conducted. It is not bound to accept any indigent students unless the State extends aid to the institution. We see no force in the argument of the relators that, because the Legislature in the act making the appropriation, designated the various departments of which the university shall be composed; it is therefore a public institution of learning and capable of receiving the appropriation.

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It is therefore ordered and adjudged that the decree of the District Court making the mandamus peremptory, be annulled, avoided and reversed. It is further ordered that there be judgment in favor of defendant discharging the rule at relators' costs.

Rehearing refused.

No. 4087.

ELLEN FITZPATRICK and HUSBAND v. THE MUTUAL AND BENEVOLENT
LIFE INSURANCE ASSOCIATION OF LOUISIANA.

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As the forfeiture of legal rights is not favored by the courts, the terms or conditions upon which a forfeiture shall happen must be strictly complied with.

Where an insurance company notified the insured that a forfeiture would not be claimed for non-payment of assessments, till thirty days after the publication of a notice of the call, for eight consecutive days, the said company should have made the publication and given the delay, because the insured had the right to expect it, and is presumed to have acted upon it.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Gilmore & Sons*, for plaintiff and appellant. *Ogden & Hill*, for defendant and appellee.

TALIAFERRO, J. The plaintiff sues as the holder and beneficiary under a policy issued by the defendants upon the life of her father, P. H. Cummings, who died first of December, 1870.

The defense is, that the policy, and all the payments made on it, were forfeited by the non-payment by the deceased of several assessments due upon the death of members of the Association. There was judgment as of non-suit against the plaintiff, and she has appealed.

But one question is presented—that of forfeiture. The notices to members of the Association to pay assessments as they arise, are made to persons residing in New Orleans, by publication in a daily newspaper in the English, German and French languages for five consecutive days. Notices of several assessments due by the plaintiff's father, it seems, were given in this manner; and it also appears that payment was not made within the time prescribed. But on the part of the plaintiff, it is contended that the mode of giving notice had been waived and modified by the custom of making personal service of notices partly in writing and partly in print, and by changing the mode and manner of publication; that Mr. Cummings was not, in this mode, notified of the calls made in the case in which the company allege the forfeiture arose; and it is shown that, in previous instances these written and printed instruments were served upon him. We incline to the opinion of the judge *a quo*, that these instruments, relied upon by the plaintiff, presented before payment, are, in reality, only copies of the newspaper notices included in a receipt prepared before-

Ellen Fitzpatrick and Husband v. The Mutual and Benevolent Life Insurance Company.

hand, but delivered only on payment of the assessment. Besides, it is shown that, within the time allotted for payment, a demand was made on Cummings, and he refused to make payment, declaring that it was a swindling concern, and that he would have no more to do with it.

Judgment affirmed.

ON REHEARING.

WYLY, J. On further examination we have come to the conclusion that the policy in this case was not forfeited.

By a clause of the policy the forfeiture would be authorized if a member failed to pay an assessment called for, within thirty days after a publication of five consecutive days of the notice.

Subsequently, to wit: on the eighth of August, 1870, the defendants addressed a notice of a call to the insured, Patrick Henry Cummings, on which the following indorsement is found:

“Members residing in the city of New Orleans are hereby notified that the notices of assessments due by them on death of a member are only given through newspaper publication—in special notice column—for eight consecutive days; being always published on the first Sunday of the month and continued through the week, including the second Sunday. Payment is required at the office within thirty days from date of publication; the failure to make payment within thirty days operates a forfeiture of his or her policy, and the name of such delinquent will be erased from the books of said association. Notices of assessments are published in the New Orleans Times, New Orleans Bee, the Daily Picayune and German Gazette. Special notices will not be sent to residence or business location.”

Under this agreement the forfeiture would not occur unless there was a failure to pay the assessment called for, after thirty days from the publication of notice for eight consecutive days in certain papers.

It appears from the evidence that the notice under which the forfeiture is claimed was only published for seven days, and also that the forfeiture was declared before thirty days thereafter had elapsed. While this indorsement remained unrecalled, it must be regarded as a voluntary extension of the time of the publication, in order to effect a forfeiture as agreed to in the contract of insurance.

As the forfeiture of legal rights is not favored by the courts, the terms or conditions upon which a forfeiture shall happen must be strictly complied with.

Having notified the insured that a forfeiture would not be claimed for non-payment of assessments till thirty days after the publication of a notice of the call, for eight consecutive days, the defendants

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should have made the publication and given the delay, because the insured had the right to expect it, and he is presumed to have acted upon it.

It is therefore ordered that the judgment of this court, rendered on the thirteenth of January, 1873, be set aside, and it is now ordered that the plaintiff recover judgment against the defendants for twenty-seven hundred dollars, with legal interest thereon from first of February, 1871, and costs of both courts.

No. 4507.

VICTOR MAURIN et als. v. CHARLES F. SMITH, Tax Collector and als.

Unless the property within an incorporated town is expressly exempted by law from a parish tax, the general power conferred on the police jury of the parish to assess a tax on all ordinary objects of taxation in the parish will reach such property.

APPEAL from the Fourth Judicial District Court, parish of Ascension. *Beauvais, J. R. N. Sims*, for plaintiffs and appellants. *Frederick Duffel*, District Attorney, *pro tem.*, for defendants and appellees.

HOWELL, J. The question presented in this suit is, whether or not parish taxes can be collected from owners of property situated in an incorporated town, when such property is not expressly exempted by law from such tax, and the police jury of the parish is vested with power to assess taxes upon the ordinary objects of taxation within the parish.

We consider this not an open question. See 13 An. 420; 19 An. 99. Unless the property within an incorporated town is expressly exempted by law from a parish tax, the general power conferred on the police jury of the parish to assess a tax on all ordinary objects of taxation in the parish, will reach such property. In this case there is no such exemption.

Judgment affirmed.

Rehearing refused.

No. 2964.

FELIX LARUE, Administrator of the Succession of LORENZO D. HILLERMAN v. J. B. VAN HORN, MICHAEL FARREL and JAMES HILL.

The Second District Court has only probate jurisdiction. This suit against the defendants, sureties of one McPhelin, the former administrator of the succession of Lorenzo Hillerman, and now deceased, should not have been brought in the Second District Court, because said suit is not probate in its character, but is simply one to enforce an obligation contracted by defendants.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. Lea, Finney & Miller* for plaintiff and appellant. *B. Egan* for defendants and appellees.

Maurin et als. v. Smith, The Tax Collector and als.

WYLY, J. C. McPhelin, the former administrator of the succession of Hillerman, died, and his legal representative, was called on by plaintiff to render an account. On the trial of an opposition thereto, the plaintiff, the present administrator of the succession of Hillerman, recovered judgment for \$474 14, with legal interest from the sixth day of August, 1867.

Alleging the insolvency of McPhelin's succession, the plaintiff brought this suit against the defendants, the sureties on the bond which McPhelin had given as administrator of Hillerman's succession.

The court dismissed the suit for want of jurisdiction, and the plaintiff appeals.

We think the court did not err. The Second District Court has only probate jurisdiction. The suit against the defendants, the sureties of McPhelin, should not have been brought in the Second District District Court, because it is not probate in its character. It is simply an effort to enforce the obligation contracted by the defendants.

Judgment affirmed.

No. 4477.

SUCCESSION OF MILTON TAYLOR. Opposition of THOMAS J. THORP et als.

Where the plaintiff was not a party to any of the judgments complained of, and this is the first suit he has brought to have them annulled and to get the relief he prays for, an exception founded on the plea of *res judicata* is inapplicable.

Where the exception is that the petition discloses no cause of action;

Held—That for the purpose of trying this exception, all the allegations being taken as true, show ample cause of action.

The argument that a testamentary disposition in favor of Mason county court, Kentucky, is immoral, and therefore null, because the legacy is to be applied to the support of indigent illegitimate children under seven years, and their indigent mothers, is not considered worthy of serious consideration.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. B. R. Forman*, for appellants. *W. W. Handlin, D. C. Labatt & Aroni, E. Morel*, for appellees.

WYLY, J. Thomas J. Thorp, "as administrator, with the will annexed," representing the estate of the deceased by appointment of the probate court of Mason county, Kentucky, and as attorney in fact for one of the legatees, brings this suit against the public administrator, and against Mary Ann Rodgers, and Phoebe Ann Taylor, and John James Taylor, claiming to be heirs at law of the deceased; and he prays that the decree of the thirtieth March, 1870, ordering the execution of Milton Taylor's will, be carried into effect; that the judgments recognizing said pretended heirs at law, and ordering them to be put in possession of the succession, be set aside and annulled; that the public administrator be dismissed from office for failing to file annual accounts, and for failing to deposit the funds of the succession in bank

Succession of Milton Taylor.

according to law, and that he be condemned to pay ten per cent. interest and twenty per cent. damages on the amount of the funds not so deposited; that petitioner be appointed dative executor, and be put in possession of the succession; and if from any cause this relief be refused, that petitioner have judgment against the succession for the amount of the legacy to the Mason county court, represented herein by petitioner.

In bar of this suit the defendants pleaded *res judicata*, and the exception that the petition discloses no cause of action. The court maintained the peremptory exceptions, and dismissed the suit. The plaintiff appeals. The plaintiff was not a party to any of the judgments complained of, and this is the first suit he has brought to have them annulled, and to get the relief he prays for; therefore the plea of *res judicata* is inapplicable. For the purpose of trying the other exception, all the allegations are taken for true.

The petitioner alleges that he is "administrator with the will annexed," of the succession, at the domicile of the deceased in Kentucky, and that the succession in this State is ancillary to that, and by the laws of Kentucky his power as administrator is the same as that of executor, with seizin; that the judgments he seeks to annul were obtained by fraud and false testimony; that these pretended heirs were adulterous bastards of the deceased, and that their mothers were slaves; and by the laws of Kentucky and Louisiana they are incapable of inheriting from the deceased; that the property in Kentucky is insufficient to pay the special legacies in the will, especially the legacy due the Mason county court (which is capable of inheriting by the laws of Kentucky); that the public administrator should be dismissed, and compelled to pay the interest and damages claimed, for failing to file his annual accounts and to deposit the funds of the estate according to law; that petitioner is entitled to be appointed dative executor, and that if from any cause this relief be denied, he is entitled to recover the legacy due the Mason county court.

Taking these averments to be true, there is ample cause of action set up in the petition.

The argument that the disposition in favor of the Mason county court is immoral, and therefore null, because it is to be applied to the support of indigent illegitimate children under seven years of age and their indigent mothers, we do not consider worthy of serious consideration. If relief to such indigent and unfortunate persons be immoral, then charity, one of the noblest Christian virtues, is itself immoral.

It is therefore ordered that the judgment herein be annulled and reversed; and it is further ordered that the exceptions be overruled, and that this cause be remanded for trial according to law, appellees paying costs of appeal.

Rehearing refused.

No. 2813.

MARY MALADY v. WILLIAM MALADY AND MARY B. CALDWELL.

The circumstance that a woman is the concubine of her male partner, does not deprive her of an action for the settlement of affairs and a participation in profits derived from capital and labor which she contributed, though much of the property claimed is real estate standing in the copartner's name alone, and had never stood in her's.

If this is good law in favor of the concubine, it is certainly good law against her, particularly when it is invoked to undo a fraud, vindicate the rights of a lawful wife, and enforce laws made to protect the marriage tie and public morals.

The fact of the social relations which Mary B. Caldwell, one of the defendants in this case, has chosen to assume, can not deprive her of what justly belongs to her. She should be allowed to place her capital and industry against the capital and industry of William Malady, her paramour and copartner, and the property purchased during the time they have been living and working together, should be declared property in which they have a joint interest; one half of it should be decreed to be the property of William Malady, and said half to belong to the community which existed between himself and his lawful wife, Mary Malady.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Rogers & Blane*, for plaintiff and appellee. *Race, Foster & Merrick*, for defendants and appellants.

MORGAN, J. Plaintiff institutes this suit to obtain a separation from bed and board from her husband, and for a settlement of the community which existed between them; and she brings Mary B. Caldwell in the litigation in order to claim certain property, now standing in her name, and described in the petition as the property of the community, averring that it was purchased with the funds of the community, although placed in Mary Caldwell's name.

This case is one of those episodes which occasionally occur to startle our ideas of the proprieties of life, which involves the actors therein in trouble, and which renders the doing of absolute justice delicate and difficult duties on the part of the judge.

Mary Malady, the plaintiff, was married to William Malady, the defendant, in May, 1834, in Dublin. Almost immediately after their marriage they came to this country. They landed in Massachusetts. Shortly after their arrival she commenced to work for herself, and she continued to do so for several years, her husband, as she alleges, being most of that time away from her. In 1838 he announced to her his intention of going to New Orleans, whither he did go, and finally wrote to her to forget him, as he intended to forget her. Subsequently he married here, and had a child. This wife died, and he then lived with Mary Caldwell, whose interests he had in charge, he having been the administrator of her father's estate. With Mary Caldwell he has been living ever since. In 1861 Mary Malady came to this city; she was weak from sickness and in want. She called upon her husband for assistance. He promised it to her, but required of her that she should live with her brother and sister, whom she has accompanied to St. Louis, San Francisco and Boston. He did furnish her from time to

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time with about \$270, but these pittancees finally ceased. And this amount seems to be everything he has contributed to the support of the woman who followed him across the seas as his wife during all the long years of their marriage. So far as this record discloses she has led an irreproachable life; in her now advancing years she is alone, helpless and destitute.

In the meanwhile, her husband has been guilty of desertion of her, of bigamy, of adulterous connection with a woman who was in some sort his ward, and with whom he has been living in open and bold concubinage.

When Mary Caldwell went to live with Malady, he gave her, rent free, the use of a house on Bacchus street which belonged to him. She then had, according to her own account, some \$500 which she had earned as a seamstress. She furnished the house. Malady was in the employ of Priestley & Bein, hardware merchants, doing a large business, where he was receiving \$100 per month wages. He had four drays running, which were constantly employed. His contract was to give Mary Caldwell \$100 per month board for himself, his four drivers and his child. This was all her source of revenue except what she may have derived from two nephews of his who boarded with her, not all the time, but as a general thing, but who always slept in the house. What board these nephews paid is not shown.

In 1859 she moved to Euterpe street. Malady paid the rent of the house, and continued to give her \$100 per month board.

This continued until June, 1862. Then Malady discontinued business. From June, 1862, he paid \$40 per month board for himself and daughter until his daughter married. He has paid no board since 1865, because Mary Caldwell says she required some person to see to her business.

On the First of December, 1856, she sold her inheritance for \$2800 cash.

As we have seen, when she first went to live with Malady she had \$500. Her first purchase of property was made on the eighth of May, 1858, for cash—\$1000.

Her second purchase was made on the ninth of January, 1858, for \$3800, of which \$1266 66 $\frac{2}{3}$ was cash, and the balance in notes which have since been paid.

Her third purchase was made on the twenty-ninth March, 1860, for \$1800, \$600 cash, balance in two notes of \$600 each, which have been paid.

Her fourth purchase was made on the first of June, 1860, for \$3250.

Her fifth purchase of property was made on the tenth of May, 1866, \$4300 cash.

In little more than two years (eighth of May, 1858, to seventh of

June, 1860), she had purchased \$9850, on which she had paid \$8650, and all of which is now paid for, and within nine years (first January, 1858, to tenth May, 1866), she had purchased and paid for property which cost \$14,150. Where did she get this money? From the time she went to live with Malady she had no industry except that of keeping a boarding house. She had no capital save the \$500 she commenced with and the \$2800 which she received as her patrimony. Taking her own figures as the price she received for board, and allowing her a fair interest on her money, and she would not have received in all, within the time specified, \$15,000.

But she says she furnished the house in which they lived. If this be true she could not have had a great deal of her \$500 left when she finished. And we must not forget that she only received \$100 per month for the board of Malady, his four draymen and his child. For these, as well as for herself and her servant, she was obliged to send to market. This would give her a family of eight persons to provide for every day, besides the wages of her servant and clothes for herself. Add to this the fuel, lights, and the many other things which are indispensable to housekeeping, how much could she have saved out of \$100 per month? If she gave her household meat to eat, she would in all probability have found herself at the end of every year in debt.

The only conclusion to which we can come in this matter is that Malady and Mary Caldwell lived together as man and wife, and that her thrift and economy, added to his industry, enabled them to acquire property, which he purchased in her name, for the purpose of placing it beyond the reach of any creditor he might have, and for the further purpose of putting it in such a shape as to prevent his wife from obtaining any of it. This, we think, should not and can not be done.

In the case of *Delamour v. Roger*, 7 An. 152, it was declared that the circumstance that plaintiff is a concubine of her copartner does not deprive her of an action for the settlement of affairs, and a participation in profits derived by capital and labor which she contributed, though much of the property claimed was real estate standing in the copartner's name alone, and had never stood in her's. If this is good law in favor of the concubine, it is certainly good law against her, particularly, as is reasoned by the district judge, when it is invoked to undo a fraud, vindicate the rights of a lawful wife, and enforce laws made to protect the marriage tie and public morals.

That Mary Caldwell should be entitled to keep the proceeds arising from the employment of her patrimony and resulting from her industry, we think is unquestionable. She has a right to it all. The fact of the social relations which she has chosen to assume, or of which she may have been the victim, can not deprive her of what justly belongs to her. What, then, is she entitled to? We think she should be

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allowed to place her capital and industry against the capital and industry of Malady, and that the property purchased during the time they have been living and working together, should be declared property in which they have a joint interest; that the one-half of it should be decreed to be the property of Malady, and his half thereof be decreed to belong to the community which existed between himself and his wife. We are fortified in this conclusion by the able opinion of our learned brother of the district court, who has given to this case a most careful consideration, and who, we think, has done justice between the parties.

The judgment is affirmed.

WYLY, J, *dissenting*. The plaintiff, the wife of the defendant, Malady, sues him for separation from bed and board on the grounds of abandonment and adultery, and she claims half of the community property. She also attacks the titles of the property held by his concubine, Mary Caldwell, on the grounds of fraud and simulation, alleging that her husband is the true owner, and that the titles were put in her name merely to defeat the community rights of the petitioner.

Mary B. Caldwell pleaded the general issue; and William Malady, her co-defendant, besides the general denial, denies that there existed a community of property between him and the plaintiff, because she has never resided with him in Louisiana, but has, for the last thirty-five years, had her residence in Massachusetts; he also denies that he owns any real or personal property to be divided. The court gave judgment for separation from bed and board, ordered a settlement and partition of the community property, and deciding that the property standing in the name of Mary B. Caldwell belongs to a partnership existing between her and her co-defendant, Malady, decreed that one-half thereof belongs to the community, and that Mrs. Malady, the plaintiff, is entitled to one-half of said half, and for the purpose of effecting said settlement and partition referred the parties to a notary with suitable directions.

From this judgment both the defendants have appealed.

In this Court the controversy is confined to the property, the plaintiff's right to a separation from bed and board not being disputed. Indeed, from the evidence, there is no doubt that the plaintiff was shamefully abandoned by her husband some thirty years ago, and that most of the time since then, he has been living in open adultery with Mary B. Caldwell.

I think the court erred in holding that there was a partnership between William Malady and Mary Caldwell, and that the property standing in the name of the latter belongs to that partnership;

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because in the record there is neither an allegation nor proof that a contract of partnership existed between these parties. A partnership arises alone from a contract; it can have its origin in no other source known to the law. The court could not, therefore, give a remedy to a contract that never existed. Outside of the property standing in the name of Mary Caldwell, we find that William Malady possessed nothing. Therefore, unless it is shown that he is the real owner of that property, there will be nothing to divide. This the plaintiff has attempted to do; and from a careful examination of the evidence, I am satisfied that the attempt is a failure. It is at best a mere suspicion.

The property was never owned by William Malady; it was acquired from other parties, and it is not shown that he ever advanced a dollar to help to pay for it.

On the other hand, it is shown that Mary Caldwell had \$2800, the proceeds of property inherited from her ancestors; that for the last twenty years she has been remarkably industrious and economical, part of the time being occupied as a milliner, but most of the time being engaged in keeping boarders.

William Malady was never wealthy; the most he ever owned was property not worth more than \$2000. He was by occupation a drayman, owned several drays, and ought to have made money. Because it is not shown what disposition he made of his earnings and the small property he once possessed, shall we say that the recorded titles of Mary Caldwell shall be treated as simulated; that she shall be held to be merely a party interposed, and that William Malady is really the owner of the property worth \$14,000, which she purchased from various persons, and which never belonged to Malady?

By the jurisprudence of this State all the presumptions of law are in favor of the owner of property. His possession and recorded titles stand to protect him against the claims of all persons setting up an adverse interest, and in order to refute them he is not required to prove how he got the money to buy the property.

If he stole the money, the property bought with it would be his. It devolves on the party alleging simulation and fraud to prove it. It devolves upon the party alleging the interposition of the holder of the legal title, and claiming himself the equitable or actual title, to prove these averments affirmatively. Has the plaintiff in this case done so?

Not a particle of proof on this important point is to be found in the record. There is no affirmative proof that Mary Caldwell was an interposed party; there is not a particle of proof to show that William Malady ever paid one dollar for the property of which he is now claimed to be the equitable or actual owner. No fraud or simulation is shown as to Mary Caldwell. There is nothing to impeach the verity of

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her or her titles, except, perhaps, she has failed to satisfy the court how she honestly acquired the \$14,000 with which to buy the property. This, in my judgment, is no reason to set aside her titles. If she acquired the money as the price of her prostitution, or if she stole it (of which there is not a particle of proof in the record), still her titles in law must stand. I regard the titles of Mary Caldwell as clear and valid as any I have ever seen, and the attempt to assail them is, in my judgment, an utter failure.

If the ownership of property rests upon no better foundation than the ability of the owner to prove, when assailed, where he got the money to pay for it, property rights would be of very little value. Nothing would be more insecure. How and when one makes money to buy property with, can not well be proved, because few persons disclose their transactions to witnesses, and besides, if they do, witnesses die.

If there was a partnership between Mary Caldwell and William Malady, of which there is neither an averment nor proof in this case, I do not see how the plaintiff, the wife of the latter, can claim any specific part of the property. All that could be done would be to sue for a settlement of the partnership. Let the debts be paid, and whatever funds each partner contributed be returned to him or her, and the profits of the partnership be equally divided.

It is proved that Mary Caldwell had \$2800, the amount inherited from her parents, and it is proved that she earned \$500 as a dress-maker, before she became the concubine of William Malady. Now, in all justice, she ought to have these sums returned before there is a partition of the partnership property. Besides, there is an heir by a putative marriage, who has some rights to William Malady's community rights in the partnership assets. But the judgment decreeing a partnership where none was alleged or proved, and ordering the partition thereof, is, in my opinion, a grave error into which the court has fallen. I therefore dissent in this case.

Rehearing refused.

No. 2994.

HANAN & RICHARDS v. R. H. BOWLES.

The attempt to make the seller and shipper responsible for the loss of the goods shipped must fail, where he had no instructions or authority to insure said goods, and the evidence does not show that this was incumbent upon him by the custom at the place of shipment.

APPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Fellows & Mills*, for plaintiffs and appellants. *Clarke, Bayne, Renshaw & E. T. Fellows*, for defendant and appellee.

LUDELING, C. J. This is a suit on an account for goods alleged to

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have been sold by plaintiffs in New York to defendant, and shipped in August and September, 1866.

There was judgment for plaintiff for \$600, rejecting the balance of his demand, to wit: \$654. The plaintiff has appealed.

The evidence establishes fully the claim of the plaintiff. The attempt to make the seller and shipper responsible for the loss of the goods, shipped per Evening Star, must fail. He had no instructions or authority to insure the goods of the defendant. We think the evidence fails to establish any such custom.

It is therefore ordered that the judgment be amended by increasing the judgment to \$1254, with five per cent. per annum from the sixth of December, 1866, and costs of both courts.

3703.

FACTORS AND TRADERS' INSURANCE COMPANY v. THE CITY OF NEW ORLEANS.

This case is held by the court to be governed by the one of Campbell v. the City of New Orleans, 12 An. 34. There is but one difference in point of fact. Campbell paid his taxes without objection or protest, and sought only to recover the amount back after it had been decided in a controversy between another party and the city, that the ordinance under which the assessment was made was unconstitutional. In the present case, the plaintiffs, before making their last payment for taxes, expressly stipulated with the City Treasurer, to whom their money was paid, that it should be returned in case there should be rendered a decision in a certain sense, by the court, in another pending controversy. But they paid, not because they were compelled to pay, but because they chose to pay, and, on the contrary, did not resist payment, as was done in the case upon the decision of which they were content to rest their case.

The stipulation by plaintiffs with the City Treasurer amounted to nothing, for it was not shown that he had authority to make the contract.

There was an unquestionable, natural obligation on the part of plaintiffs to bear their *quota* of the expenses of carrying on the municipal government of the city of New Orleans. The plaintiffs have enjoyed all the advantages and protection of that municipal government. To return to them the money which they have paid in consideration of these advantages, would be to give them the protection which they required for their persons and property, and make their fellow citizens pay for it.

The law under which plaintiffs paid their taxes, was in full force and vigor at the time. It is a fallacy to contend that it never had any life because it was unconstitutional.

Rights may be acquired under a law, notwithstanding that law may have been subsequently declared to have been unconstitutional.

To escape the penalties inflicted by a law, or avoid responsibilities imposed by it, upon the ground that it is unconstitutional, its unconstitutionality must be distinctly declared before the penalty or responsibility has accrued.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. George S. Lacey*, City Attorney, and *H. H. Walsh*, Assistant City Attorney, for defendant and appellant. *Gibson & Austin*, for plaintiffs and appellees.

WYLY, J. The plaintiff sues the defendant for \$10,175 56, the amount of a license tax paid by it to the defendant during the years 1867, 1868 and 1869, on the ground that the said tax was unconstitutional, because not equal and uniform upon all persons pursuing the business or occupation of insuring.

25	454
107	328
107	229
107	231
25	454
108	464

The court gave judgment for the amount claimed, and the defendant appeals.

The license tax collected from the plaintiff in 1867 was five-eighths of one per cent. on the amount of premiums received, and in 1868 and 1869 it was one and one-half per cent. on the amount of premiums.

Any percentage on the amount of premiums received is clearly unconstitutional, because all insurance companies do not receive the same amount of premiums. Article 124 of the Constitution of 1864, and article 118 of the Constitution of 1868, require that a license tax, as well as a tax on property, shall be equal and uniform. To be equal and uniform, the tax must be the same on all persons pursuing the particular occupation or calling taxed, without reference to the abilities, fortunes or success of those engaged in it. *City of New Orleans v. Home Mutual Insurance Company*, 23 An.

“He who has received what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it.” R. C. C., art. 2301.

Upon this article, and articles 2302 and 2304, the plaintiff relies to support its demand for the restitution of the amount improperly paid. The defendant, however, contends that there was a natural obligation, binding the plaintiff in conscience and natural justice to pay what was paid, and therefore, under article 2303, it can not be recovered. Article 2303 declares that “to acquire this right” (the right to receive what was improperly paid) “it is necessary that the thing paid be not due in any manner, either civilly or naturally. A natural obligation to pay will be sufficient to prevent the recovery.”

It will be observed, from the plain provisions of article 2303, that in order to defeat the right of recovery there must be a natural obligation to pay “the thing paid;” to pay the particular debt that has been collected.

If A pays a forged note to B, recovery of the amount can not be defeated, because the latter may hold a natural obligation against him resulting from being the owner of another note that is prescribed.

The law in express terms only permits the action for repetition to be defeated where there was a natural obligation to pay the “thing paid;” that is, to pay the particular debt that has been paid. Now the inquiry is, not whether there was a natural obligation binding the plaintiff in conscience and natural justice to pay some other debt of equal amount to the city of New Orleans for the support of its government or otherwise, but it is simply whether there was a natural obligation to pay the particular debt or claim that was paid and which is alleged to be unconstitutional?

It is useless to pursue any other inquiry, because the defense announced in article 2303 is in precise terms, limited to the particular debt or claim paid.

The question then is, was the plaintiff under a natural obligation to pay an unconstitutional tax?

We say no. An unconstitutional ordinance of a municipal corporation is an absolute nullity; it was void from the beginning; it never had any obligatory force either in law or conscience.

To say that an assessment in direct violation of the constitution binds the citizen in conscience and natural justice, is an absurdity too manifest to require argument.

Until there is an assessment (and an unconstitutional assessment is no assessment) there is no debt; there is no obligation either natural or civil.

The amount collected from the plaintiff was unduly collected, because he never owed the debt; there was no ordinance of the city requiring of the plaintiff a license tax. What was supposed to be an ordinance requiring the assessment of the tax never had any existence, because it contravened article 124 of the constitution of 1864 and article 118 of the constitution of 1868.

In support of his position, counsel of the defendant cites several decisions of this court: 9 R. 325; 12 An. 34, 346, 421. In not one of these cases was the question now under consideration presented, to wit: Whether there is a natural obligation to pay an unconstitutional tax?

This court has never held that an unconstitutional tax imposes a natural obligation to pay.

A natural obligation is defined to be one that can not be enforced by action, but it is binding "in conscience and according to natural justice." Revised Code, 1757. How any act of the corporation of New Orleans, prohibited by the Constitution, can create an obligation binding "in conscience and according to natural justice," we can not imagine. In *Isam J. Sims v. The Parish of Jackson*, 22 An. 440, the question was, whether the plaintiff could recover from the defendant the amount of a cotton tax collected from him during the years 1865, 1866 and 1867, on the ground that said tax was not equal and uniform, and therefore it was violative of article 124 of the Constitution of 1864, then in force. The court held he could do so, and gave judgment against the parish of Jackson for the amount unduly collected of Sims. This is the only case to be found in our reports where the precise question now under consideration was presented.

While that decision stands, and we see no reason to overrule it, a party who has paid a municipal corporation an unconstitutional tax may demand its restitution, or the restitution of the amount thereof.

Judgment affirmed.

HOWELL, J., *dissenting*. For the reasons given by the court in the case of *Campbell v. New Orleans*, 12 A. 34, I think the plaintiffs should

not recover. In my opinion, there is no distinction, in regard to the natural obligation, between a tax or license illegally imposed, that is, not in conformity to the mode prescribed by the statute, and one unconstitutionally imposed, that is, not in the mode prescribed by the Constitution. There was a natural obligation resting on the plaintiffs to contribute to the support of the city government, and the fact that the sum paid by them was not uniform with the sums paid respectively by other insurance companies, did not destroy that obligation. The principle announced in article 2303, R. C. C., if applicable to the subject of taxation, does not, I think, rest on the sum paid, but on the natural obligation to pay. It is not pretended that the plaintiffs were exempt from the payment of the license. On the contrary, article 118 of the Constitution is imperative that they "shall obtain a license, as provided by law." An assessment is only the means of carrying out the obligation to contribute to the support of the government.

I therefore dissent.

ON REHEARING.

MORGAN, J. Plaintiffs seek to recover from the city of New Orleans \$10,175 66, with legal interest on various amounts and from various dates, upon the ground that through error, or under protest, they paid to the city \$1030 on the fourteenth January, 1867, for license tax for that year; \$3892 56 on the twenty-ninth January, 1868, for license tax for that year; and \$5253 on twenty-seventh February, 1869, for license tax for that year. They aver that these various sums of money were exacted and collected from them by virtue of several ordinances of the city government, dated respectively twenty-seventh December, 1867, thirty-first December, 1868, twenty-ninth December, 1869.

They aver that these ordinances were in violation of the constitution of the State which was in force at the time they were enacted; that they were unequal, oppressive, and not uniform; and were, therefore, by reason of their unconstitutionality, absolutely null and void. They aver that the city has exacted and collected the various large sums related by them without the color or authority of law, and that it still retains them, in violation of the constitution.

Further they aver, that the city specially agreed to re'turn to them the sum of \$5253, if the Supreme Court should declare the ordinance imposing this license tax under which this sum was collected unconstitutional, in a litigation which was pending when this license was paid; and that notwithstanding the decision of the Supreme Court which has declared the ordinance to be unconstitutional, the city persists in its refusal to return the same.

In their supplemental petition they aver, that the ordinances under

which they paid were so rigid that they were compelled to pay or incur the danger of having their place of business closed.

Defendant admits the receipt of the money, and admits that there was an agreement on the part of a city official to refund the money in case it should be decided, in the matter then pending between the city and the Mutual Insurance Company, that the ordinance was unconstitutional, but avers that the official aforesaid had no authority to bind the city. It further avers, that any money paid by plaintiffs for license tax was truly and justly due and owing to the city; that the money so paid was necessary for the purpose of defraying the expenses of the city; that it was faithfully appropriated to that purpose; and that plaintiffs have received their proportionate share of the benefit derived therefrom, in the protection of their interests and property.

They further allege, that if the plaintiffs were not legally bound to pay a license tax to the city, they were at least under a natural obligation to contribute their quota to the support of the municipal government from which they derived protection, and that under such circumstances an action will not lie to recover the several amounts alleged to have been paid, even though such payment had been made under protest.

It is not alleged nor, we believe, disputed that the money was not collected and disposed of in the manner and for the purposes set forth in the answer.

In principle, we think the case is governed by the case of *Campbell v. the city of New Orleans*, 12 An. 34.

In that case, as in this, Campbell paid to the tax collector a certain sum of money as his city tax for the year 1850. In that case, as in this, it did not appear that the money was paid under any compulsory warrant or execution. It is alleged here that if plaintiffs had not paid they incurred the risk of having their place of business closed, but it is not shown that they had been condemned to pay by any authority.

In that case, as in this, there was a judgment in a suit between the city and another party defendant, declaring the ordinance, under which the tax was proposed to be collected of him, unconstitutional. And there, as here, it was not denied that the money paid by the plaintiff was necessary for the purpose of defraying the expenses of the years for which they were collected. The court declared that the municipal authorities were virtually the plaintiff's agents for the purpose of laying such an assessment upon his taxable property as would defray his share of the necessary expenses of police, etc.; that the assessment was laid upon property legally liable to taxation, although they had neglected in so doing to pursue certain prescribed forms—a neglect which would have rendered the plaintiff's obligation to pay invalid *in foro legis*, if he had raised the objection in time and in the proper

manner. The court considered that he was under a natural obligation to pay his proportion of the expenses of the municipal government and that, inasmuch as he had paid the amount assessed to him for that purpose, he had only discharged a natural obligation; and as no suit will lie to recover what has been paid or given, in compliance with a natural obligation, gave judgment for the city. If this opinion of the court be a correct exposition of the law, the plaintiffs have no case.

In one particular the controversy between Campbell and the city differs in point of fact from the case we are now considering, in this, that whereas Campbell paid without objection or protest, and sought only to recover after it had been decided in a controversy between another party and the city that the ordinance under which the assessment was made was unconstitutional, in this case the plaintiffs, before making the last payment, expressly stipulated with Mount, the City Treasurer, to whom the money was paid, that it should be returned in case this court should determine the case of the city v. another insurance company in a certain sense. Still there was not any coercion on the part of the city, under force of which this payment was made. There was no execution in the hands of the sheriff by which their property could have been seized in case they did not pay. There was no judgment commanding them to pay. They paid, not because they were forced to pay, but because they chose to pay. They aver, it is true, that they were threatened with the close of their place of business in case they did not pay, but their relief from this apprehension was not by paying; on the contrary, it was by resisting payment, as the company did in the case upon the decision of which they were content to rest their obligation. The stipulation with Mount, the Treasurer, amounts to nothing, for it is not shown that he had any authority to make the contract on the part of the city which the plaintiffs set up. If he was not able to bind the city, the stipulation which he made is not obligatory. There was an unquestionable natural obligation on the part of the plaintiffs to bear their quota of the expenses of carrying on the municipal government of the city of New Orleans. Their domicile is here; their business is done here; they have an interest in the paving and lighting of the streets, and the building and repairs of wharves; they have the same interest in the maintenance of a good police that other inhabitants of the city have, and it is of vital importance to the success of their company that the fire department should be kept in a state of proper efficiency. None of these things can be done without money. The money necessary to carry them on must be contributed by the citizens. It is levied in the form of a tax or contribution, or by whatever name you may chose to call it, and when collected it is used for these purposes. It is because of its general

ramifications, benefiting each and every inhabitant of the city alike, that each and every one of its inhabitants is under a natural obligation to contribute, in proportion to his means, toward the support of these departments, without which the place could not be lived in. Now, it is not pretended that plaintiffs have not enjoyed the advantages and protection of the municipal government. To return to them the money which they have paid in consideration of these advantages, would be to give them the protection which is requisite to their existence, and make their fellow-citizens pay for it.

There is, in our opinion, another reason why the plaintiff should not recover. It is, that the law under which the tax was paid was in full force and vigor at the time the money was paid. It is contended that it never had any life because it was unconstitutional; that an unconstitutional law is no law, and therefore must be considered as never having been written. This is a fallacy. The rule of universal application is, that all laws are presumed to be constitutional until the contrary is decided. Courts do not assume to themselves the prerogative of deciding on their own motion, that a law under which rights are claimed or duties are imposed is unconstitutional. To authorize them to do this the matter must be directly put at issue by the parties litigating before them. Rights can be acquired under a law which may be determined to have been unconstitutional, and pains and penalties be avoided by those who justify their acts as having been committed under a law, however that law may have been subsequently declared to have been unconstitutional. If a piece of property is sold under a *fi. fa.* issued in the case of A v. B, and C purchases it, if it should thereafter be determined in a litigation between D and C that the law under which A obtained his judgment against B was unconstitutional, would B be entitled to get back his property from C? If the Legislature passed a law regulating trials in criminal cases, and A, being indicted for murder, was tried under that law, found guilty, sentenced and was hung, and in the case of B, tried before the same tribunal for the same offense, B's counsel should, after conviction, and on a motion in arrest of judgment, convince the judge that the law under which he was trying the case was unconstitutional, and the prisoner be discharged, would the sheriff who had hung A be liable to be punished? Certainly, if the position contended for be correct that an unconstitutional law is *ipso facto* null and void, for the killing would have been unlawful; it would have been willful, and would have been perpetrated upon a reasonable being, who was, when the killing was done, in the peace of the commonwealth. Such a result, so monstrous, is only to be avoided by adhering to the rule that to escape the penalties inflicted by a law, or to avoid responsibilities imposed by a law

upon the ground that it is unconstitutional, its unconstitutionality must be distinctly alleged before the penalty is imposed or the responsibility is determined.

It is therefore ordered, adjudged and decreed that the judgment heretofore rendered by us be set aside, and it is now ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, and that there be judgment in favor of the defendants with costs in both courts.

WYLY, J., *dissenting*. I adhere to the first opinion delivered by this court in this case, and I reserve the right to file an additional argument in support of my position.

LUDELING, C. J., *dissenting*. I am constrained to dissent from the opinion of a majority of my associates. I adhere to the opinion originally rendered in this case, which I think is in accordance with the law and jurisprudence of this State. Article 2301 of the Civil Code provides that "He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he unduly received it." Article 2302 says: "He who has paid through mistake, believing himself a debtor, may reclaim what he has paid." "To acquire this right, it is necessary that the thing paid should not be due in any manner, either civilly or naturally. A natural obligation to pay will prevent the recovery." The same doctrine is announced in the Institutes of Justinian, lib. 111, tit. 28, De Solutione Indebiti, Cooper, p. 292; in Pothier, vol. 1, chaps. 1 and 2; in Domat, No. 1520, and in Larombiere. "Le paiement fait sans cause oblige a restitution celui qui l'a regu." Vol. 5, 612 et seq.

I can not conceive how there can be a natural obligation to pay an illegal tax. A tax can only be imposed by law; if any obligation springs from the law, it must be a legal obligation. In my opinion the original decree should remain undisturbed.

No. 4582.

JAMES E. YEATMAN, Executor, et al. v. LOUISIANA STATE BANK and B. H. BUCKNER.

This is a suit to annul a judgment alleged to have been obtained through fraud and ill-practice. The evidence adduced was not such as to satisfy the court that these allegations were well founded.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Thomas P. Farrar and J. A. Campbell*, for plaintiffs and appellees. *Sparrow & Montgomery*, for defendants and appellants.

HOWELL, J. The plaintiffs sue to annul a judgment rendered upon

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a third opposition filed by them in the case of the Louisiana State Bank v. B. H. Buckner, and on which they claimed a preference to the proceeds of certain mortgaged property seized in said suit. The ground of nullity is that said judgment was obtained through fraud and ill-practice, the said opposition having been called up and tried when the plaintiffs were absent and unrepresented.

The plaintiffs were the vendors of a plantation and slaves, sold in June, 1855, to the defendant, B. H. Buckner, and in October, 1867, they commenced proceedings, *via ordinaria*, in the District Court of Madison, to enforce their mortgage and privilege, but did not proceed to judgment. In March, 1869, the Louisiana State Bank took out executory process and caused the said land to be sold on the first May following. The plaintiffs filed a third opposition in said proceeding, claiming, by preference, the proceeds of the sale, which, by agreement, were deposited in the said bank. Nothing further was done therein until twenty-fifth April, 1870, when the defendant, Buckner, filed an answer to the third opposition, and on the ninth May following the bank filed an answer, and on the next day judgment was rendered in favor of the said defendants, the records of the court showing that the case was regularly set and taken up for trial.

A similar disposition was made, at the same time, of the suit *via ordinaria* brought in 1867. Between the date of filing the third opposition and the trial, as above stated, the counsel of the plaintiffs withdrew the notes on which the said proceedings were based, gave them up to his clients, formally withdrawing from said suits, and changed his domicile to California. His business in that and other courts of the district was generally left with a particular attorney, but it was shown on the trial below that the said cases of these plaintiffs had not been thus disposed of. On the contrary, a different attorney had been consulted in regard to a transfer of the cases to the United States Court in New Orleans; but the plaintiffs concluded to let them stand as they were, under the belief, as they say, that the only disposition which could be made of them was a dismissal, and they instituted new proceedings on their notes in the federal court. It was after the institution of this suit in the United States tribunal, which was known to defendants' counsel, that the answers were filed and judgments rendered in the Madison court. The counsel for the defendants, who acted for them throughout, swears that he believed at the time of the trial that the plaintiffs were represented by the attorney who attended generally to the business of their absent attorney, and who was then present in court. And such seems to have been the impression also of the district judge. There is nothing to show that either of the defendants thought otherwise, or had any knowledge that the plaintiffs had no counsel in the said cases then pending in said court.

Yeatman, Executor, et al. v. Louisiana State National Bank and Buckner.

The evidence does not satisfy us that there was fraud or ill-practice on the part of the defendants.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendants, with costs in both courts.

Rehearing refused.

No. 2950.

U. J. ROSENTHAL v. L. MYERS.

Where the defendant acted merely as an agent and exhibited his authority, neither doing nor saying anything by which he obligated himself to pay the plaintiff any sum whatever, and nothing was mentioned between them as to compensation ; but, on the contrary, notice was given to the plaintiff that the services which he had been bespoken to perform, were desired from another person ;

Held—That whether the plaintiff has or not any legal claim against the principal, it is clear that he has none against the defendant.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Hawkins & Tharp*, for plaintiff and appellee. *Cotton & Levy*, for defendant and appellant.

HOWELL, J. The plaintiff sues for \$1000 upon an alleged employment by defendant to go to Brownsville, Texas, and Matamoros, Mexico, to perform the religious rite of circumcision on two children, alleging that, in compliance with said engagement, he went to said towns, but the parents of the said children refused his services, having employed another party. He avers that his expenses, time, professional skill, etc., were well worth to him the sum claimed.

The defense is a general denial, and the allegation that a letter was written from Brownsville to one Levi in Galveston, Texas, for the Rev. J. Hochwald to perform the said rite, and containing the request if the said Hochwald was absent, the letter should be forwarded to Aaron & Myers in New Orleans, which was done, and the defendant, one of said firm, learning that Hochwald was in California, exhibited the letter to the plaintiff and asked him if he would go, which he agreed to do, the said letter being left with him, plaintiff; that on the next day Hochwald arrived in New Orleans and was advised of the said letter, and both he and defendant notified the plaintiff that he, Hochwald, would go in accordance with the directions in the said letter; and that the custom is not to make any charge for performing the said rite.

There was judgment against defendant for \$600, and he appealed.

We think the evidence fails to fix any liability on the defendant for the debt of other parties. He acted merely as the agent of the parents of the two children and exhibited his authority. He neither did nor

Rosenthal v. Myers.

said anything by which he obligated himself to pay the plaintiff any sum. Nothing was said between them as to compensation; and he gave immediate notice to the plaintiff that the party desired by the parents of the children would go as requested. Whether the plaintiff has any legal claim against the said parents or not, it is clear that he has none against the defendant.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

No. 2933.

VILLENEUVE LE BLANC et als. v. PHILIP MARSOUDET et als.

Where a suit was instituted on promissory notes, which were the obligations of an ordinary partnership, whose members were only bound jointly and had to be sued as joint obligors;

Held—That a citation addressed to the firm, and served at the elected domicile of the ordinary partners, did not have the effect of bringing them into court. The judgment against them is, therefore, a nullity. The citations should have been addressed to each of the defendants.

APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. H. J. Grover*, for plaintiffs and appellees. *Carlton Hunt*, for defendants and appellants.

LUDELING, C. J. This is a suit to annul a judgment by default on several grounds. It will be necessary to notice only one of them, to wit: the want of a citation.

The suit in which the judgment complained of was rendered was based upon promissory notes executed by V. Le Blanc, Jr., & Co., an ordinary partnership. Following is a copy of one of the notes:

“\$3,500.

NEW ORLEANS, March 12, 1861.

“On the thirteenth of January next we promise to pay to the order of ourselves, at the office of Messrs. Bellocq, Noblom & Co., in New Orleans, thirty-five hundred dollars, for value received, with interest at the rate of eight per cent. per annum after maturity until paid.

V. LE BLANC, JR., & Co.

The other note was similar to the foregoing, with the exception of the date of its maturity. These being obligations of an ordinary partnership, the members thereof were bound jointly only, and had to be sued and cited as joint obligors. 14 La. 364; *McGehee v. McCord et als.*

Neither of the joint obligors was cited. The only citation in the record is addressed to V. Le Blanc, Jr., & Co., the firm, and was served at the supposed elected domicile of the defendants. We pre-

Villeneuve Le Blanc et als. v. Marsoudet et als.

termit the expression of an opinion upon the question whether or not the defendants could have been sued out of the parish of their real domicile at the date of the institution of that suit. But we have no doubt that a citation addressed to a firm, and served at an elected domicile of the ordinary partners, did not have the effect of bringing them into court. The citations should have been addressed to each of the defendants. C. P., art. 179, sec. 2.

The defendants in that suit were not cited, and the judgment is an absolute nullity.

It is therefore ordered that the judgment of the district court be affirmed with costs of appeal.

Rehearing refused.

No. 4109.

JUREY & HARRIS v. MRS. MARY J. HORD et als.

Where it is admitted that the money claimed by plaintiffs was given to the defendant and her two children, and that by the act of their merchants and factors, the garnishees in this case, said money was placed to the sole credit of their mother, the defendant;

Held—That this act did not divest the right of her children, the intervenors in this proceeding, and did not make the money garnisheed the sole property of defendant. There was no such confusion or mingling as affected the rights of the intervenors.

A PPEAL from the Fourth District Court, parish of Orleans. *Theard, J. Semmes & Mott*, for plaintiffs and appellees. *Hunton, Grover & Bemiss*, for intervenors and appellants. *A. Robert*, curator *ad hoc*, for absent defendants.

HOWELL, J. The intervenors in this case have appealed from a judgment dismissing their intervention, in which they claimed the funds attached herein by plaintiffs as belonging to the defendant.

“It is admitted that the money attached in this suit was in the name of Mrs. Mary J. Hord, on the books of Joseph Hoy & Co. (garnishees), and that Mrs. Mary J. Hord received the same from Mrs. Eliza Askew, her mother, who gave it to Mrs. Hord and her two children (the intervenors), to defray the expenses of the Cold Spring plantation, for the year 1870.”

“It is admitted that Mrs. Hord is the administratrix of the estate of her former husband, and that she and her two children, Lizzie and Andrew Jackson, are the owners of the Cold Spring plantation, Washington county, Mississippi.” The suit of plaintiffs is not for supplies for the year 1870, and hence no question as to any liability of intervenors therefor arises. Nor is there any force in the position of plaintiffs, that “if the intervenors had any interest in the money, it was lost when it became confused with the money of the defendant; it could no longer be identified; and when it was deposited by Mrs. Hord

Jurey & Harris v. Mrs. Mary J. Hord et als.

in her own name with the garnishees, it became subject to her debts and to seizure by her creditors."

The admission is, that the money was given to the mother and two children, and the act of the merchants, the garnishees, in placing it all to the credit of one, did not divest the right of the other two, and make it the sole property of the one. There was no confusion or mingling which affected the rights of the intervenors, and by other evidence the said sum of money belonged in equal parts to the three. Hence the intervenors are entitled, under the foregoing facts, to recover two-thirds thereof. Mrs. Hord has not appealed from the judgment against her. We understand from the record and the briefs, that the sum of \$3531, in the hands of the garnishees, is the matter in controversy.

It is therefore ordered that the judgment dismissing the intervention herein be reversed, and that the intervenors, Lizzie and Andrew Jackson, be decreed entitled to two-thirds of the sum of \$3531, in the hands of Joseph Hoy & Co., garnishees, with their costs in both courts.

No. 4360.

B. A. MALONE v. LAWRENCE CASEY et als.

The Parish Court has jurisdiction of suits for the recognition of heirship and for the partition of succession property, and where the amount involved exceeds five hundred dollars, the appeal is directly to this court.

Where in a suit instituted for partition by plaintiff against her coheirs, a curator *ad hoc* was appointed, on the prayer of the plaintiff, to one of said heirs who was a minor, the appointment was erroneous.

A PPEAL from the Parish Court of Jefferson. *Keon, J. W. W. Edwards*, for plaintiff and appellant. *R. L. Preston*, for defendants and appellees.

ON MOTION TO DISMISS THE APPEAL.

HOWELL, J. A motion is made to dismiss this appeal on the ground that "if the Parish Court, from whence this appeal has been taken, was vested with jurisdiction of the cause, which is excepted to, then the appeal should be from that court to the district court of the judicial district, and this court has no appellate jurisdiction herein."

This proposition is not true. The parish court has jurisdiction of suits for the recognition of heirship and the partition of succession property, as this is, and when the amount involved exceeds five hundred dollars, the appeal is directly to this court. Const., art. 88; C. P. 1022.

Motion overruled.

ON THE EXCEPTIONS AND MERITS.

TALIAFERRO, J. The plaintiff, claiming to be an heir of Mary Casey, deceased, instituted an action of partition against her coheirs to have the succession property of the decedent's estate partitioned. One of the heirs being a minor, the plaintiff prayed for the appointment of a curator *ad hoc* to represent the minor in the partition proceedings, and the appointment was made as prayed for. The defendants excepted to the jurisdiction of the parish court, and also to the appointment of a curator *ad hoc* to represent the minor. These exceptions were adopted by the curator *ad hoc*, and they were sustained by the court, and the suit dismissed. The plaintiff has appealed.

The appointment of a curator *ad hoc* to represent the minor was erroneous, and to that extent the exception should be sustained; but as to the jurisdiction, it should be overruled. The Court of Probates has jurisdiction "in partitions of successions, where minors, interdicted or absent persons are interested." C. P., art. 924, sec. 14.

So far as we can learn from a rather scant record, it would appear that the proceedings in this case have been irregular. The succession can only be accepted on behalf of the minor with benefit of inventory, and it appears he is without a tutor. The succession is without a representative, and the minor's interest therein not ascertained and secured. Under this state of facts, we deem it best to remand the case for further proceedings.

It is therefore ordered and adjudged that the judgment of the Parish Court, so far as it sustains the exception to the appointment of a curator *ad hoc* to represent the minor be affirmed; but in all other respects it be annulled and reversed. It is further ordered that this case be remanded to the court of the first instance, to be proceeded with according to law, the defendants and appellees paying costs of this appeal.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

JUNE, 1873.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. P. H. MORGAN.

} *Associate Justices.*

NOTE.—The following decisions, Nos. 774, 796, 787, 783, 791, 779, 793, 771, 770, 788, 794, 768, 765, 781, 775, 772, 785, 780, 766, 769, 798, 790, 795, delivered in 1872, and belonging to the Twenty-Fourth Annual, are published in this volume at the request of my predecessor, by whom they were not received in time to be published by him.—REPORTER.

No. 774.

P. J. PAVY & Co. v. JUSTE BERTINOT.

Where the defendant objected to the ruling of the court receiving in evidence a note and mortgage, on the ground that they were not stamped at the time of their execution, as required by law, and where it appeared that neither the notary before whom the act of mortgage was passed, nor the parties, had any stamps when the act was passed, and mention of the fact was made in the act, but that one of the plaintiffs went immediately to Opelousas, purchased the necessary stamps from the recorder, who placed them on the act and canceled them in the presence and at the request of the party;

Held—That this was sufficient.

Where at the time a mortgage-bearing note was given, no stamps were affixed to it, but before the note was offered in evidence it had been stamped by the district United States collector of internal revenue, who collected the interest required by law and remitted the penalty, this was all the law required of the parties.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Thomas H. Lewis*, Acting J. *Martel & Hudspeth*, for plaintiffs and appellants. *H. L. Garland*, for defendant and appellee.

LUDELING, C. J. The plaintiffs instituted two suits against the

defendant, one on a mortgage note for \$4274 86, with eight per cent. interest from maturity, and the other on a balance of account for \$898 14, and for a portion of this account they claimed to have a privilege upon certain machinery furnished to the defendant. The plaintiffs also obtained an injunction to prevent the defendant from wasting, dilapidating or disposing of the mortgaged property, during the pendency of the suit, and to prevent him from using the gin and mill. They also obtained a writ of sequestration. The cases were tried together by consent; and there was judgment dissolving the injunction and setting aside the writ of sequestration, with one thousand dollars damages against the plaintiffs, and for the sums claimed by the plaintiffs against the defendant, subject to a credit of three hundred and fifty dollars, and recognizing the mortgage and privilege claimed by the plaintiffs. From this judgment the plaintiffs have appealed. The defendant has prayed for an amendment of the judgment in his favor, in his answer to the appeal.

The defendant excepted to the ruling of the court receiving the note and mortgage in evidence, on the ground that they were not stamped at the time of their execution, as required by law. It appears that neither the notary, before whom the act of mortgage was passed, nor the parties had any stamps when the act was passed, and mention of this fact is made in the act, but that one of the plaintiffs went immediately to Opelousas, purchased the necessary stamps from the recorder, who placed them on the act, and canceled them in the presence and at the request of the party. This we think was sufficient. The note was made on the seventeenth of July, and the mortgage to secure it was passed on the twenty ninth of the same month. At the time the note was given, no stamps were affixed to it; but before the note was offered in evidence, it had been stamped by S. A. Stockdale, United States collector of internal revenue, first district of Louisiana, who collected the interest required by law, and he remitted the penalty. This was all the law required of the parties. See *Levy & Schener v. Solomon Loeb*, just decided.

On the merits, the only question we deem necessary to notice is in reference to the amount of damages allowed against the plaintiffs for wrongfully suing out the injunction and sequestration. It appears that the mill and gin were stopped, during two or three days, by these proceedings; and two witnesses testify that the services of an attorney to defend this suit are worth six hundred dollars. There is no evidence to show the amount of damages done by preventing the defendant from using his mill and gin during two or three days, if any were done him; or to prove the value of the services of an attorney to have the injunction and sequestration set aside—for which alone the plaintiffs can be held responsible. We think one hundred

and fifty dollars ample to cover all damages occasioned by the improvident suing out of these writs.

It is therefore ordered, that the judgment of the lower court be amended so as to reduce the amount of the judgment in favor of the defendant for damages to one hundred and fifty dollars, to be credited on the judgment in favor of the plaintiffs—and that, as thus amended, the judgment be affirmed, with costs of appeal.

No. 787.

25 471
44 432

ADDIE E. HARRIS AND HUSBAND v. ADELINE KEIGLER AND HUSBAND.

Where in defense against plaintiffs' claim, an agreement with said plaintiffs in full satisfaction of the amount due them, was relied on by defendants on account of their tutorship, and a bill of exception was taken to its introduction in evidence, on the ground that an agreement of this nature could not be established by parol evidence;

Held—That when all the parties are able to contract, if they did make a contract, there is no reason why it may not be proved by competent proof.

APPEAL from the Parish Court, parish of St. Mary. *Handy, J. Dumartrait, Tucker & Davis*, for defendants and appellants. *Winchester, Caffery & Foster*, for plaintiffs and appellees.

LUDELING, C. J. The plaintiffs sue the defendants for an account of their tutorship.

The answer alleges that, long before, an account of the tutorship was rendered, which was approved of by the plaintiffs after having examined it, and kept it in their possession more than ten days; and that afterwards they agreed with defendants to take twenty-five hundred dollars in cash, and the defendants' note for \$7500, in full satisfaction of the amount due them, as shown by the account rendered.

There was judgment in favor of the plaintiffs, disregarding said alleged settlement, and the defendants have appealed.

On the trial the defendants offered witnesses to prove the agreement and settlement stated in the answer, which was objected to on the ground that an agreement of this nature could not be established by parol evidence; the objection was overruled, and the plaintiffs took a bill of exceptions. We see no error in the ruling. The parties were all able to contract, and if they did make a contract, we can perceive no reason why it may not be proved by competent proof. The case of *Rawls v. Rawls*, 6 An. 666, relied upon by plaintiffs, presented a different state of facts.

This case is analagous to *Chapman et al. v. Chapman*, 13 An. 228.

On the merits, we think the defendants have fully established their defense.

The position of the plaintiffs, that the verbal agreement, which exceeds five hundred dollars, is not established, because the testimony of one of the two witnesses for the defense is offset or annulled by that

Addie E. Harris and Husband v. Adeline Keigler and Husband.

of a witness for the plaintiffs, is untenable, even if it were true that the plaintiffs' witness contradicted the defendants' witnesses. The law is that the agreement shall be proved by at least one witness and corroborating evidence. Here two witnesses prove the agreement; besides, the note given the plaintiffs is a corroborating circumstance to support the testimony.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and proceeding to render such judgment as should have been rendered in the court *a qua*, it is ordered and adjudged that there be judgment in favor of the plaintiffs, against the defendants, for the sum of seven thousand five hundred dollars, with eight per cent. per annum interest thereon from the thirteenth of June, 1871, till paid, and costs of the lower court. It is further ordered that the costs of appeal be paid by the appellees.

No. 796.

STATE OF LOUISIANA v. JEAN GAY FILS, et als.

25	472
115	789

Where the defendants were fully informed by the allegations of the indictment of the offense with which they were charged, it was unnecessary to allege also the common law ingredients of the crime of rape, with the intent to commit which the accompanying offense of burglary was charged.

The duty imposed by law with regard to the venire of the jury is ministerial, and one which can be performed by a deputy of one of the specified officers, when legally appointed.

The challenge to a juror, whose native tongue was the French, and who did not understand the English language, was properly sustained.

The proceedings of the court are required to be conducted in the English language—and the fact that the judge, counsel, witnesses, and accused understand and speak other languages can not dispense with this requirement. Jurors, to be competent, must be able to understand all the pleadings and proceedings, as they must be considered by them.

The right of the State to challenge without cause is limited to the number six, whatever may be the number of defendants joined in the indictment.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry, King, J. Criminal case—*G. W. Hudspeth*, District Attorney, for the State. *B. A. Martel and G. H. Wells* for defendants.

HOWELL, J. The defendants, Jean Gay Fils, and Joseph Duplechain, having been found guilty of breaking and entering a dwelling house in the night time with intent to commit a rape, have appealed from the judgment sentencing them to imprisonment at hard labor in the State penitentiary for life. They assign as error:

First—The court *a qua* erred in overruling their demurrer to the indictment against them, because the said indictment describes the crime of rape by its technical name only; and the intent to commit rape being of the essence of the crime charged, the indictment is fatally defective in not containing all the common law requirements or ingredients of that specific crime, as provided in the 976th section of the Revised Statutes.

The defendants were indicted for a statutory offense against a habitation, denounced in section 850, Revised Statutes, to wit, breaking and entering a dwelling house at night time, and being armed with a dangerous weapon, with the intent to commit a rape upon a certain person, at the time lawfully in said house. The indictment is a compliance with said statute. It charges the felonious and burglarious breaking and entering a dwelling house at a certain hour of the night of a certain day, with the unlawful and felonious intent then and there, to commit the crime of rape in and upon a certain person then lawfully in said dwelling house; the said accused each being armed at the time with a certain dangerous weapon. They were fully informed, by the allegations of the indictment, of the offense with which they were charged, and it was unnecessary to allege also the common law ingredients of the crime of rape, with the intent to commit which the said offense of burglary was charged.

Second—The venire of the jury, from which were selected the jurors who tried this cause, was drawn by the parish judge, deputy sheriff, and a deputy clerk of the court, while the 2127th section of the Revised Statutes requires that it should have been drawn by the parish judge, the sheriff and the clerk of the court—the duty being one which can not be performed by a deputy.

We consider the duty in this regard to be ministerial and one which can be performed by a deputy of one of the specified officers, when legally appointed.

Third—The court erred in sustaining the challenge to the juror, Eugene Joubert, for the cause, that he could not speak nor understand the English language, when his native tongue was the French; most of the witnesses testified in French; the judge and one of the counsel spoke French, and a translator was appointed.

The court did not err. The proceedings of the court are required to be conducted in the English language, and the fact that the judge, counsel, witnesses and accused, understand and speak other languages can not dispense with this requirement. The jurors, to be competent, must be able to understand all the pleadings and proceedings, as they must be considered by them.

Fourth—The court erred in allowing the State more than six peremptory challenges.

This assignment is well made. In the case of the State v. Earle and Garvey, 24 An. 38, we held that in each criminal prosecution the right of the State to challenge without cause is limited to the number six, however many defendants may be joined therein. This necessitates a new trial.

It is therefore ordered that the judgment appealed from be reversed, and that this cause be remanded for a new trial.

No. 783.

SUCCESSION OF LEONTINE GUILBEAU.

Where the administrator of a succession, within six days after his appointment, gave bond and entered upon the discharge of the duties of his office, and so continued to the knowledge of the creditors and heirs until the expiration of nearly two years, when, upon the *ex parte* application of some of the heirs and the husband of the deceased, his appointment was canceled on the ground "that he failed and neglected to give the security or give the mortgage required by law, and that more than ten days had elapsed since his appointment," and one of the said heirs prayed to be appointed administrator—to which said administrator filed an opposition and prayed for the annulling of the order canceling his appointment.

Held—That the exceptions to the introduction of evidence to prove the inability of the administrator at the date of the bond, to furnish sureties in the parish of the succession, and to establish the sufficiency of the sureties on the said bond, could not be sustained.

The administrator having already been removed by an *ex parte* proceeding, and being, by the pleadings thus forced upon him, put in the position of the attacking instead of the assailed party, and to avoid multiplicity of suits, if for no other reason, the court would be inclined to permit him to do what he might have the right to do in a direct action for his removal based on the ground of the alleged irregularity and insufficiency of his bond.

Besides, the object of the evidence offered and excepted to was to enable the judge *a quo* to execute the law authorizing him to pass on the sufficiency of the security of persons residing out of the parish, and to acquire such proof as he might deem necessary.

Where the administrator had been appointed, had qualified, furnished a bond, and caused inventories to be made, if there is any informality or insufficiency in such acts or proceedings which would authorize a removal, this could be accomplished only in a direct action by petition and citation.

The bond as furnished in the first instance, was not a nullity. There was, at least, a *prima facie* compliance with the requirements of the law, which should have been regularly attacked, if deemed insufficient.

A PPEAL from the Parish Court, parish of Lafayette. *Moss, J. Ed. Eug. Mouton*, for appellant. *De Blanc & Fournet*, for appellee.

HOWELL, J. In March, 1870, Theodore Devalcourt was appointed administrator of the succession of Leontine Guilbeau, deceased wife of Augustine Guidry, and within six days thereafter he gave bond and entered upon the discharge of the duties of his office, and so continued to the knowledge of the creditors and heirs, until in February, 1872, when, upon the *ex parte* application of some of the heirs and the husband, his appointment was canceled on the ground "that he failed and neglected to furnish the security or give the mortgage required by law, and that more than ten days had elapsed since his appointment," and one of the said heirs prayed to be appointed administratrix. To this demand, which was published, Devalcourt filed an opposition, and prayed for the annulling of the order canceling his appointment, on the ground that it was rendered without citation, notice or legal process of any sort. In an amended petition he averred his inability to give security in the parish of Lafayette, and prayed that the bond already furnished by him be accepted.

From a judgment on these pleadings, sustaining the opposition, setting aside the order annulling the appointment of Devalcourt and accepting the bond previously furnished by him, this appeal is taken by the party seeking the appointment.

Succession of Leontine Guilbeau.

The theory of the appellant is that the bond which was furnished by the appellee in April, 1870, was worthless because the securities thereon did not reside in the parish of Lafayette, where the succession was opened, and the judge did not authorize the taking of securities elsewhere, and had not specially accepted the said bond. On the trial of the cause upon the pleadings made, the appellant objected to the introduction of evidence to prove the inability of the appellee, at the date of the bond, to furnish sureties in the parish of the succession, and to establish the sufficiency of the sureties on the said bond, upon the grounds, first, that it was too late, and could not be admitted to the prejudice of appellant's action in the premises, and secondly, that it could not be received at this stage of the proceedings, and the judge alone had by law the right to pass on the surety.

The objections that were made are not sufficient to exclude the evidence under the circumstances. Irregularities are patent in the proceedings, but the particular proceeding, in which these objections are raised, is not an action for the removal of the appellee, as was in the case of the succession of De Flechier, 1 An. 20, cited by the appellant, and therefore no action of her's in the premises could be prejudiced by the evidence offered. The appellee had already been removed in an *ex parte* proceeding, and he was, by the pleadings thus forced on him, put in the position of the attacking instead of the assailed party, and to avoid multiplicity of suits, if for no other reason, we would be inclined to permit him to do what he might have the right to do in a direct action for his removal, based on the ground of the alleged irregularity and insufficiency of his bond. It may be further said that the law (Revised Civil Code 3042) which says the judge alone shall pass on the sufficiency of the surety tendered of persons residing out of the parish, also authorizes him to require such proof as he may deem necessary. We conclude, as said above, that the judge did not err in overruling the objections as set up.

Nor do we find such error in the judgment appealed from as to require its reversal. The order removing the appellee, Devalcourt, was a nullity, having been made without citation, notice or appearance. He had been appointed, had qualified, furnished a bond and caused inventories to be made, and if there was informality or insufficiency in such acts or proceedings, which would authorize a removal, this could be accomplished only in a direct action by petition and citation. C. P. 1017, 1018. The record does not enable us to say that the judge improperly accepted the bond, of the sufficiency of which he seems to be satisfied. We do not regard the bond as furnished in the first instance, as a nullity. There was, at least, a *prima facie* compliance with the requirements of the law, which should have been regularly attacked, if deemed insufficient.

Judgment affirmed.

Winston v. Nunez, Administrator.

No. 770.

THOMAS WINSTON v. DEMOSTHENE NUNEZ, Administrator.

A party acquiescing in and voluntarily discharging a judgment before appealing, can not recover the amount paid in satisfaction thereof.

APPEAL from the Eighth Judicial District Court, parish of Vermilion. *Bailey, J. Olivier, Dumartrait & Breaux*, for plaintiff and appellee. *William Kibbe and R. S. Perry*, for defendant and appellant.

WYLY, J. On eighteenth October, 1866, the defendant recovered judgment against the plaintiff for \$2140 dollars and interest, and on the sixth February, 1867, he paid it. On twenty-second June following he took a devolutive appeal, and in September, 1869, he succeeded in getting the judgment which he had paid reversed by the Supreme Court. He now sues for the repetition of the sum paid in satisfaction of said judgment. The court gave judgment for the plaintiff, and the defendant appeals.

We think the court erred. Here was a voluntary execution of a judgment. It was not till four months thereafter that the devolutive appeal was taken. That appeal would have been dismissed had the fact sufficiently appeared to the court that the judgment had been voluntarily executed. The judgment rendered in the absence of this evidence can not benefit the plaintiff. It now appears that he acquiesced in and voluntarily discharged the judgment before appealing. He can not recover the amount paid in satisfaction thereof.

It is therefore ordered that the judgment appealed from be annulled, and it is ordered that there be judgment for the defendant with costs of both courts.

No. 779.

FRELSEN & STEVENSON v. ELBERT GANTT.

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108	498

A simple acknowledgment of a debt, when prescription is acquired, is not a renunciation of the prescription. In this case the evidence does not establish a positive promise to pay. At most, it was an offer to compromise by the payment of half, which was not accepted.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Henry L. Garland*, Acting Judge. *J. M. Moore*, for plaintiff and appellant. *Martel & Hudspeth*, for defendant and appellee.

HOWELL, J. The principal question in this case is whether or not the account sued on is prescribed. It embraces the period from June 1, 1861, to December 3, 1861, and is not shown to be an account stated or acknowledged within three years, and this suit was not instituted

Frellsen & Stevenson v. Gantt.

within that time; but it is contended on behalf of plaintiffs that in 1866 the defendant acknowledged and promised to pay the account.

A simple acknowledgment of a debt, when prescription is acquired, is not a renunciation of the prescription; and in this case the evidence does not establish a positive promise to pay. 21 An. 275. At most, it was an offer to compromise by the payment of half, which was not accepted. There was no express renunciation, oral or written, and no fact shown which gives a presumption of the relinquishment of the right acquired by prescription. R. C. C. 3461.

Judgment affirmed.

No. 771.

ALFRED DUPERIER v. CELESTINE DARBY et als.

The plaintiff can not recover against an indorser, when it is in evidence that the consideration of the indorsement was a slave.

APPEAL from the Third Judicial District Court, parish of Iberia. *Train, J. Olivier & Dumartrait*, for plaintiff and appellant. *De Blanc, Fournet & Gary*, for defendants and appellees.

WYLY, J. This is a suit against the makers and indorsers of a promissory note for \$900.

The defense is the slave consideration of the note. The indorsers also contend that they were not duly notified of the dishonor of the note. The court gave judgment for the defendants, and the plaintiff appeals.

In June, 1859, J. V. Danterive purchased several slaves from Achille Bessan and Emilia Bessan, and in evidence, in part, of the price, indorsed and delivered to his vendors the note in suit, which he held, and which was made by Celestine Darby and A. B. Danterive. This note was subsequently indorsed and transferred to the plaintiff.

The consideration of this note, executed several days before the sale by parties in no manner connected therewith, is presumably valid. It evidenced a subsisting debt due by Celestine Darby and A. B. Danterive to J. V. Danterive.

The consideration of the contract of indorsement by the latter was slave; and as against this indorser the plaintiff can not recover.

There is nothing to show that the other contracts of indorsement had slave considerations.

In *W. H. Letchford & Co. v. Succession of Weil*, lately decided, this court held that, each indorsement being a new contract, the right of the indorsee to recover against his indorser can not be defeated because the maker received a slave consideration for the note.

Duperier v. Celestine Darby et al.

There is nothing, therefore, in the slave defense, except as to the indorser, J. V. Dauterive. As to the indorser Bessan, the notice of dishonor was sufficient. The certificate of the notary and his own evidence establish the fact satisfactorily.

As to the other indorsers, notice of dishonor is not proven, and they are consequently released.

It is therefore ordered that the judgment of the court *a qua* be annulled as to the defendants, Celestine Darby, A. B. Dauterive and Achille Bessan; and it is now ordered that the plaintiff recover judgment against each of them for nine hundred dollars, with eight per cent. per annum interest thereon from first of April, 1862, three dollars and fifty cents cost of protest, and all costs. As to the other defendants, it is ordered that the judgment be affirmed.

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46 1044

No. 791.

CAROLINE LANOUE, Administratrix, v. A. C. DUMARTRAIT, Administrator.

- The only privilege granted by law to the depositor is on the price of the sale of the thing deposited by him.
- The law does not give a general privilege to the depositor, but simply on a particular movable.
- Where the funds deposited have been appropriated by the depositary, and of course can not be identified, and the amount thereof or therefor is not due to the depositary by another, there is nothing subjected to the privilege.
- There is no law known to the court that allows the general privilege claimed by the plaintiff, as depositor, on the property of the depositary's succession. Said succession, being insolvent, other creditors would be affected, and it seems that, to avail, plaintiff's claim, if it exist, registry is necessary, but has not been made.

A PPEAL from the Third Judicial District Court, parish of St. Mary.
Train, J. F. Gates, for plaintiff and appellant. *DeBlanc & Perry*, for defendant and appellee.

HOWELL, J. Counsel agree that only two questions are presented in this case, to wit:

First—Is the plaintiff, a depositor, entitled to a privilege against the depositary of funds deposited with and used by him?

Second—Can the depositary plead, in compensation, debts due by, or paid on account of the depositor, for any other purpose than the preservation of the thing deposited?

The defendant, not having appealed, the latter question, practically decided against him, can not be examined.

As to the first, the only privilege granted by law to the depositor, is a privilege "on the price of the sale of the thing by him deposited."

Caroline Lanone, Administratrix, v. Dumartrait, Administrator.

R. C. C. 3217, No. 5, 3223 and 2962. In this case there is nothing on which the privilege can operate. The law does not give a general privilege to the depositor, but simply on a "particular movable." There is no price of the sale of the thing due. The funds have been appropriated by the depositor, and, of course, can not be identified; and the amount thereof or therefor, not being due to the depositor by another, there is nothing subjected to the privilege. The plaintiff is claiming a general privilege upon the property of the depositor's succession, and we are aware of no law which accords such a privilege, and the succession being admitted to be insolvent, other creditors would be affected, and it seems that to avail the plaintiff, if it exist, registry is necessary, but has not been made.

Judgment affirmed.

No. 788.

HEIRS OF ONEZIME ISAAC THIBODEAUX v. FELIX VOORHIES, Testamentary Executor, et als.

Where the character of the suit, as ascertained from the prayer of the petition, is not an action of revindication, but is simply a suit to annul a will, because the formalities prescribed by law were not observed in making it, the parish court, which admitted the will to probate, has jurisdiction of the case.

Where the formalities required by Art. 1578, Revised Code, were not complied with, a will is not good as a nuncupative testament by public act, nor can it be held good as a nuncupative will by private act, when the proof adduced fails to show that the formalities required for it have been observed.

A PPEAL from the Parish Court, parish of St. Martin. *Z. T. Fournet*, Special Judge, in the place of the parish judge, recusing himself. *Gabriel A. Fournet, DeBlanc & Perry*, for plaintiffs and appellees. *Felix Voorhies* and *Edward Simon*, for defendants and appellants.

WYLY, J. This is a suit by the heirs at law of O. J. Thibodeaux to annul his nuncupative will by public act:

First—Because the said nuncupative testament does not state that it was received by the notary in the presence of three witnesses residing in the place where the will was executed, or by five witnesses not residing in the place;

Second—Because it does not state that it was dictated by the testator to the notary and written by him as dictated;

Third—Because the said testament does not state that it was read to the testator in the presence of the witnesses.

The defendants pleaded the general issue, and averred that the will is clothed with the formalities required by law and is valid to all intents and purposes.

They subsequently excepted, on the ground that the suit is an action of revendication, and, as the amount involved exceeds \$500, the parish court is without jurisdiction.

The character of the suit, as ascertained from the prayer of the petition, is not an action of revindication; it is simply a suit to annul the will because the formalities prescribed by law were not observed in making it.

The parish court, which admitted the will to probate, has jurisdiction of the case.

The will recites that, at the request of the testator, the notary, with the three witnesses mentioned therein, repaired to his residence, and he (the testator) "requested me to write his testament, which I did at his dictation, as follows:"—Here the dispositions are written, and the act concludes as follows:

"And the said Onezime I. Thibodeaux having declared that he had nothing else to add to the testament, it was closed, and immediately thereafter I read, in a loud and intelligible voice, the will, and he declared that he well understood it; and he persisted in declaring that it contained his last will. This act done and signed at the residence of Onezime Isaac Thibodeaux, in presence of Messrs. Auguste Guilbeau, Elisee Guilbeau and Charles Porter, competent witnesses for the purpose, who have signed the same with testator, and me, the notary, all after being read, and without interruption or turning aside to other acts."

It is very obvious that the formalities required by article 1578, Revised Code, were not complied with. There is no express mention that the witnesses were present at the dictation, nor at the reading to the testator. *Devall v. Palms*, 20 An. 202; *Succession of Clement Wilkins*, 21 An. 115, and authorities there cited.

But the defendants contend that, if the will is not good as a nuncupative testament by public act, it is good as a nuncupative will by private act.

The proof adduced, however, fails to show that the will was read to the witnesses in the presence of the testator. Revised Code 1582. There are also only three attesting witnesses, and the evidence fails to satisfy us that a greater number could not be had. Revised Code 1583.

It is unnecessary to consider the exceptions taken by the defendants to the ruling of the court in refusing to allow their amended answer to be filed, because the evidence it was intended to lay the foundation for, was admitted by the court.

It is therefore ordered, that the judgment of the court *a qua* annulling the will be affirmed, with costs of both courts.

Guillory v. Dejean, Administrator.

No. 793.

AUGUSTIN GUILLORY v. WILLIAM DEJEAN, Administrator.

Where the defense to a promissory note was the prescription of five years, and several credits being indorsed on the note, oral evidence was offered to prove that payments were made by the deceased at the dates indicated by the indorsements, the exception to the evidence was well taken.

The plea should have been maintained.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *E. T. Lewis*, acting judge. *H. L. Garland*, for plaintiff and appellee. *Bailey & Estelette*, for defendant and appellant.

LUDELING, C. J. This is a suit on a promissory note. The defense is the prescription of five years. The note was due fifteenth of December, 1858, and citation was served on the twenty-sixth March, 1867. There are several credits indorsed on the note, and oral evidence was offered to prove that payments were made by the deceased at the dates indicated by the indorsements. To the reception of this evidence a bill of exceptions was taken. The judge *a quo* erred. See R. C. C. article 2278.

The plea should have been maintained.

It is therefore ordered and adjudged that the judgment of the lower court be annulled, and that there be judgment in favor of the defendant rejecting the plaintiff's demand, with costs of appeal.

No. 794.

DOMINIQUE LALANNE v. D. L. GOODBEE et al. A. H. CHALMERS, Intervenor.

The fact that the limit to which supplies might have been required according to contract, was not reached, does not amount to a violation of, or a refusal to comply with the contract, where there is no evidence that the plaintiff was called on and refused to furnish more than is claimed by him in his suit.

Laborers have their privilege independent of and distinct from that of the furnisher of supplies, and each privilege attaches as against the owner of the crop produced.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J.* *John J. Morgan*, for plaintiff and appellant. *Lewis & Brother*, for defendants and intervenor, appellees.

HOWELL, J. This is a sequestration suit on an account for supplies furnished to the defendants to make a crop under a written contract, and for a privilege on the said crop and certain movables. The defense admits the contract, but alleges its violation on the part of plaintiff in not furnishing the whole amount agreed on; denies that there was any cause for the issuance of the writ of sequestration, and sets up a claim for damages in reconvention for an illegal seizure. A. H. Chalmers, intervenes, claiming to be the owner of a part of the

sugar cane sequestered and damages for its seizure and loss. Judgment was rendered dismissing plaintiff's suit as of non-suit, and condemning him to pay damages respectively to the defendants and intervenor, from which plaintiff has appealed.

The correctness of the account sued on, and a valid ground for the writ of sequestration, are, in our opinion, satisfactorily established. The fact that the limit, to which supplies might have been required, was not reached, does not amount to a violation of, or refusal to comply with the contract. Plaintiff bound himself to furnish supplies to a certain amount to enable defendants to make a crop of cotton, corn and cane, and he appears to have furnished all that were demanded. There is no evidence that he was called on and refused more than is claimed in this suit, and we think the circumstances sworn to by plaintiff and proven on the trial warranted him in bringing suit at the time and causing the writ of sequestration to issue in order to secure his privilege. The judgment therefore in favor of the defendants, was erroneous.

The only difficulty in the case is presented by the intervention; but a careful examination of the pleadings and evidence leads us to the conclusion that the intervenor is the owner of that portion of the sugar cane which was in a windrow at the time of the seizure. He swears positively, and he is corroborated by a disinterested witness, that the said cane was raised on his land, not rented to the defendants, who were for their labor in its cultivation to receive one-half in kind, but that before the seizure they had commuted the compensation, and the intervenor had allowed them, the defendants, one hundred and fifty dollars, for which he gave them credit on their rent. This cane being on his land, distinct from that portion rented to the defendants, must be considered in his possession and not liable to seizure for the debt of the defendants due to plaintiff for supplies. We understand the contract between plaintiff and defendants, in connection with the evidence, to relate to the crops raised by the latter in their own right and for themselves, and not to that which they cultivated as laborers for the intervenors. The privilege is granted against the owner of the crop, and not those who are employed to cultivate it. The laborers have their privilege independent of, and distinct from that of the furnisher of supplies, and each privilege attaches as against the owner of the crop produced. The portion of cane under consideration is shown to have belonged to the intervenor at the time of the seizure and before, and of course the privilege operating against the defendants did not attach to it. The amount, however, allowed to the intervenor, as the value of the cane, which is shown to have been totally lost to him in consequence of this seizure, is excessive. He had about five acres, and it appears that these five acres would have planted about

Lalanne v. Goodbee et al.

twenty acres, and that he was offered fifteen dollars per acre for every acre which his cane would plant. This makes the cane worth at most, three hundred dollars, and in our opinion, a fee of fifty dollars is ample for legal services in recovering his rights in this action.

The defendants are liable jointly, that is, Duncan L. Goodbee for one-half, and the widow and heirs of David Goodbee, jointly, for the other half.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that the plaintiff have judgment against the defendants for eleven hundred dollars and seventeen cents—against said Duncan L. Goodbee for his half thereof; against Mrs. Justin Goodbee, widow of David Goodbee, deceased, for one-fourth thereof, and against the minor heirs of said David Goodbee, deceased, for the remaining fourth thereof, with privilege on and the right to sell the property sequestered herein, except that portion of the sugar cane in windrow at the time of seizure, and claimed by the intervenor, and with costs of suit and sequestration in the lower court. And it is further ordered that the intervention of A. H. Chalmers be sustained, and that he recover of plaintiff the sum of three hundred and fifty dollars and costs of intervention in the lower court, costs of appeal to be paid by appellees.

No. 768.

ISAAC D. SEYBURN v. EUGENIE DEYRIS, Widow of Henry Penn, Sr.,
et als.

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114 1086

ABBREVIATED STATEMENT OF FACTS.

On the eighth of April, 1854, Henry Penn, Sr., in a public act, acknowledged his indebtedness to Philibert Hebert, natural tutor of his children, in a certain sum payable in three installments, one-third thereof at the majority of each of the children, and the interest payable annually. In order to secure the said debt, in the same act, he mortgaged the property described in plaintiff's petition.

On the fourteenth of February, 1859, the said Penn, Sr., died, and after a short administration the property was distributed among the surviving widow, Eugenie Deyris, and the heirs; the part encumbered with the said mortgage, being community property, was adjudicated to said widow, natural tutrix of the minors, Henry Penn, Jr., and Clara Penn.

The plaintiff in this case, on the fourteenth of January, 1867, became the holder and owner of the mortgage obligation of Henry Penn, Sr., in favor of Philibert Hebert, tutor, by a private act of the latter to him, and also of a note subscribed by Widow Eugenie Deyris, dated the seventh of April, 1862, which note states as its consideration the interest accrued during the years 1860, 1861 and 1862, on the mortgage obligation transferred to plaintiff; and subsequently, on the twenty-eighth of February, 1868, Eugenie Deyris waived prescription on this note.

Previously, on the first of January, 1868, Widow Eugenie Deyris and one of the heirs, Clara Penn, had executed together another interest note for another year on the mortgage claim held by plaintiff.

Plaintiff now sues Widow Eugenie Deyris, and the heirs, Henry Penn, Jr., and Clara Penn, for the amount of the mortgage claim and notes given for the interest as aforesaid, and also to enforce the mortgage.

Seyburn v. Eugenie Deyria, et als.

POINTS.

Where a debt was acknowledged in an act of mortgage and not represented by note, the prescription of ten years is applicable.

The prescription of ten years was interrupted as to Widow Eugenie Deyria, by the note which she gave on the seventh of April, 1862, for the interest accrued during the years 1860, 1861 and 1862, and inasmuch as subsequently, on the twenty-eighth of February, 1868, she waived prescription on this note.

The note signed on the first of January, 1868, by Eugenie Deyria, widow of Henry Penn, Sr., and by one of the heirs, Clara Penn, representing the interest for another year on the mortgage claim, did not amount to a renunciation of prescription by Clara Penn, as to her share of the past installment of the mortgage debt. That note contains no renunciation by her of the prescription already accrued.

There is no force in the objection that the mortgage perempted for want of reinscription within ten years. Neither inscription, nor reinscription, is necessary, so far as the parties to the mortgage or their heirs are concerned.

The property mortgaged was community, and no distribution thereof among the heirs and surviving widow (whose rights are only residuary) can defeat the mortgage given by the deceased to secure a community debt.

There is no difficulty in the objection that the plaintiff can not enforce this claim, because of the informalities of the transfer thereof by the natural tutor. This is a question that concerns the minors. The formalities for the alienation of their property being alone for their benefit, they alone can urge the omission thereof.

But, at the time of the transfer in this case, the heirs were of age, and they received the money paid by the transferee.

It is no ground to reverse a judgment, if correct, because the Judge *a quo* gave wrong reasons, or because the decree does not conform to the reasons given by him.

As to the question whether interest should be allowed on the notes given for the interest on the mortgage claim, it is determined in the affirmative.

By these notes the interest forming the consideration was capitalized. It was a valid consideration for the debt, evidenced by these notes, and there can be no reason why they should not bear interest.

It is unnecessary to inquire whether the note subscribed in January, 1868, by Eugenie Deyria and her daughter, Clara Penn, was a joint or solidary obligation, because the court gave judgment on it against them jointly, and this judgment can not be increased by holding it to be a solidary obligation, for the reason that the plaintiff and appellee has not prayed for the amendment of the judgment.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. Tucker & Davis*, for plaintiff and appellee. *A. C. Demartrait, Deblanc & Perry*, for defendants and appellants.

WYLLY, J. On the eighth of April, 1854, Henry Penn, Sr., in a public act, acknowledged his indebtedness to Philibert Hebert, natural tutor of his minor children, Jean Louis, St. Cyr, and Dumas Hebert in the sum of \$1944 80, payable in three installments, one-third thereof at the majority of each of the children, and the interest payable annually at eight per cent.

In order to secure the said debt, in the same act, he mortgaged the property described in the petition, being a sugar plantation. On the fourteenth of February, 1859, the said Henry Penn died, and after a short administration, the property was distributed among the surviving widow and the heirs; the part encumbered with the said mortgage, being community property, was adjudicated to the widow.

On the seventh of April, 1862, she gave her note for \$336 73 for the interest accrued on the mortgage debt during the years 1860, 1861 and

Seyburn v. Eugenie Deyris, et als.

1862; and subsequently, to wit: the twenty-eighth of February, 1868, she waived prescription on this note.

On the first of January, 1868, she and one of the heirs, Clara Penn, executed their note for \$179 19, the interest for another year on the mortgage claim.

On the fourteenth of January, 1867, the plaintiff became the holder of the said mortgage claim, and also of the note given for interest thereon by the surviving widow on the seventh of April, 1862.

He now sues the widow Eugenie Deyris, and the heirs, Henry Penn, Jr., and Clara Penn, wife of Frank H. Rodgers, for the amount of the mortgage claim, and also for the amount of the notes given for the interest as aforesaid, and also to enforce the mortgage.

The court gave judgment against Eugenie Deyris, widow of Henry Penn, Sr. on the original mortgage claim, for \$1109, with eight per cent. per annum interest thereon, from fifteenth of March, 1864, for the further sum of \$336 73, with eight per cent. interest thereon from fifteenth of March, 1862, the amount of her note of seventh of April, 1862, also for the further sum of \$89 59 with legal interest, from twenty seventh of April, 1869, half of the amount of the note executed by her and Clara Penn, on first of January, 1868. The court also gave judgment against Clara Penn (wife of F. H. Rodgers) for \$417 78, with eight per cent. per annum interest thereon, from fifteenth of March, 1864, as her share of the mortgage claim due by her ancestor, and also for the further sum of \$89 59, with legal interest thereon, from twenty-seventh of April, 1867, one-half of the amount of the note signed by her and her mother on first January, 1868, for one year's interest on the mortgage debt. The court also gave judgment against Henry Penn, Jr., for \$278 55, the amount found to be due as his share of his ancestor's mortgage debt, one of the installments thereof being held to be prescribed as to this heir. The mortgage was rendered executory, as prayed for, and the property was ordered to be sold to satisfy the judgment against the widow and heirs.

From this judgment the defendants have appealed.

They contend—

First—That the mortgage claim is prescribed.

Second—That the mortgage has perempted for want of reinscription within ten years.

Third—That the plaintiff is not entitled to enforce the claim against them, because Philibert Hebert, natural tutor, had no authority and could not make a valid transfer of a negotiable asset belonging to his wards;

Fourth—That the judgment signed by the court does not conform to the reasons given for the judgment.

Fifth—A new trial should have been granted on the showing made.

As the debt was acknowledged in the act of mortgage and not represented by notes, the prescription of ten years is applicable.

The installments fell due respectively, twenty-fifth November, 1856, twenty-first September, 1859, and in the year 1864, the periods at which the three minors, represented by the natural tutor, arrived at the age of majority.

The citations were served on twenty-seventh April, 1869. There is no question as to the prescription of the last two installments, because the ten years had not elapsed from their maturity when the suit was brought. It is only as to the first installment. As to the widow, the court did not err in holding that the notes which she gave for interest on the mortgage debt, on seventh April 1862, and on first January, 1868, interrupted prescription.

The court also correctly held that the first installment (one-third of the debt) was prescribed so far as relates to the share thereof due by Henry Penn, Jr., because, as to him, there was no interruption of prescription, and more than ten years had elapsed from the maturity of the first installment to the institution of the suit.

As to Clara Penn (wife of F. H. Rodgers), we think the court erred in holding that the signing of the note for \$179 19 on first January, 1868, for interest for one year on the mortgage debt, amounted to a renunciation of prescription as to her share of the past installment of the mortgage debt.

The note for interest signed on first January, 1868, contains no renunciation of the prescription already accrued. 23 An. 621 ; Revised Statutes of Louisiana, section 2821.

There is no force in the objection that the mortgage perempted for want of reinscription within ten years. Neither inscription nor reinscription is necessary, so far as the parties to the mortgage or their heirs are concerned. (The property mortgaged was community property, and no distribution thereof among the heirs and surviving widow, whose rights are only residuary, can defeat the mortgage given by the deceased to secure a community debt.)

Neither do we find any difficulty in the objection that the plaintiff can not enforce the claim because of the informalities of the transfer thereof by the natural tutor. This is a question that concerns the minors. The formalities for the alienation of their property being alone for their benefit, they alone can urge the omission thereof; they can ratify the transfer, expressly or impliedly, after majority. At the time of the transfer the heirs were of age, and they received the money paid by the transferee.

It is no ground to reverse a judgment, if correct, because the Judge gave wrong reasons, or because the decree does not conform to the reasons given by him.

Seyburn v. Eugenie Deyris, et als.

The showing made for a new trial was not sufficient. Jean Louis Hebert was not the payee of the mortgage claim, nor was he the holder. Besides, his receipt was not adduced, and it is not shown who made the alleged payment to him, Henry Penn, Sr., being then dead. If the defendants made the alleged payment, they should have sworn to the fact, which they did not.

As to the question whether interest should be allowed on the notes given for the interest on the mortgage claim, we will remark that, in our opinion, it can. By these notes the interest forming the consideration was capitalized; it was a valid consideration for the debt, evidenced by these notes, and we see no reason why they should not bear interest. R. S. 1870, sec. 1889.

Whether the note subscribed in January, 1858, by Eugenie Deyris and her daughter, Clara Penn (wife of F. H. Rodgers), was a joint or solidary obligation, it is unnecessary to inquire, because the court gave judgment on it against them jointly, and this judgment can not be increased by holding it to be a solidary obligation, for the reason that the plaintiff and appellee has not prayed for the amendment of the judgment.

It is therefore ordered that the judgment against Eugenie Deyris be affirmed, with costs; also that the judgment against Henry Penn, Jr., be affirmed, with costs; and that the judgment against Clara Penn (wife of F. H. Rodgers), be amended by reducing the sum of four hundred and seventeen dollars and seventy-eight cents, found to be her share of the mortgage claim, to two hundred and seventy-eight dollars and fifty-five cents, and as thus amended let it be affirmed; and as to her, let the appellee pay costs of appeal.

No. 765.

STATE ex rel. R. J. HUNTER, District Attorney pro tem., v. O. K. HAWLEY, Public Administrator.

No proceeding can be had, under the intrusion act, to remove the defendant from the office of public administrator, on the ground that said office has ceased to exist by virtue of the repeal of the law creating it. The case presented by the relator does not fall within the provisions of the Statute.

APPEAL from the Ninth Judicial District Court, parish of Rapides. *Orsborn, J. R. J. Hunter*, District Attorney pro tem., for the State, appellant. *R. J. Bowman*, for defendant and appellee.

WYLY, J. This is a proceeding under the intrusion act, to remove the defendant from the office of public administrator on the ground that said office has ceased to exist by virtue of the repeal of the law creating it. It is admitted that the defendant was regularly appointed to the office, and that his appointment was confirmed by the Senate; and

State ex rel. Hunter, District Attorney pro tem., v. Hawley, Public Administrator.

it is not pretended that any one else is entitled to the office. The sole ground for the proceeding is the office has ceased to exist. How any one can intrude into an office that does not exist it is difficult to imagine.

Although the defendant has not made the point, we feel bound to notice that the intrusion act furnishes no remedy for a case like this. A proceeding may be instituted under this act only in the following cases, viz:

First—"When any person shall usurp, intrude into or unlawfully hold or exercise any public office or franchise within this State; or,

Second—When any public officer shall have done, or suffered to be done, an act which by the provisions of law shall work a forfeiture of his office; or,

Third—When any association or number of persons shall act within this State as a corporation without being duly incorporated."

The case presented by the relator does not fall within the provisions of the statute, and it should be dismissed. The judgment in favor of the defendant must be amended.

It is therefore ordered that the judgment for the defendant be amended to read as follows, viz: let there be judgment for the defendant, dismissing the suit with costs of both courts.

No. 781.

JOSEPH T. LABIT, Administrator, v. PIERRE FRANCIONI.

Where the plaintiff, alleging that the succession represented by him was the joint owner with the defendant of a steamboat, sued to have the right of the succession recognized and for its share in the net earnings of the boat while in the possession of the defendant, and said defendant excepting that, if the plaintiff had any rights, which is denied, the present suit was not the form in which they can be asserted, contended that said plaintiff must sue for a general settlement, the exception must be overruled.

The mere fact of being joint owners of a steamboat did not constitute plaintiff and defendant partners, when there is in the record no evidence of partnership.

Plaintiff is entitled to claim his right to the boat, if he be a joint owner, and if he has asked for a share of the earnings of the boat, instead of the price of the use of his property, it does not follow that he will get it, or that he is therefore a partner.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. F. R. King and J. A. Breaux*, for plaintiff and appellant. *Dumartrait, De Blanc & Perry*, for defendant and appellee.

LUDELING, C. J. The plaintiff, alleging that the succession, represented by him, is the joint owner, with defendant, of a steamboat, sues to have the right of the succession recognized, and for the net earnings of the boat while in the possession of the defendant.

The defendant excepted, that, if the plaintiff has any rights, which is denied, the present suit is not the form in which they can be asserted; that he must sue for a general settlement of the partnership.

 Labit, Administrator, v. Francioni.

The exception was maintained, the suit was dismissed and the plaintiff has appealed.

There is nothing in this record to show that any partnership ever existed between the deceased and the defendant. The mere fact of being joint owners of the steamboat did not constitute them partners. The plaintiff alleges that the boat belonged to the deceased and the defendant, that the defendant unlawfully changed the name of the boat, and made other changes in her, and has used her for his own benefit, and that he refuses to account for said use of the boat. Plaintiff alleges that the boat has earned \$250 net per month, and he prays for judgment accordingly. He does not allege a partnership, nor does the defendant admit one. He certainly has a right to claim his right to the boat if he be an owner, and if he has asked for a share of the earnings of the boat, instead of the price of the use of his property, it does not follow that he will get it, or that he is therefore a partner. It is difficult to conceive what general settlement can be had (judging from the allegations of the petition) other than an account for the use of the property. We are of opinion that the exception should have been overruled.

It is therefore ordered that the judgment appealed from be annulled, that the exception be overruled, and that the case be remanded to be proceeded with according to law. It is further ordered that appellee pay costs of appeal.

 No. 798.

SUCCESSION OF THOMAS S. HARDY AND WIFE.

The act of 1853 fixing the prescription of judgments at ten years from their rendition, also provides the only means by which it can be averted, and said prescription, therefore, can only be averted by complying with these requirements.

An acknowledgment and promise to pay by an administrator, is not an acknowledgment and promise by the debtor himself or by his specially authorized agent, even if the draft given by the administrator for the payment of the judgment, with the right of subrogation to the drawee, can be regarded as an acknowledgment and promise to pay the judgment. It is not considered that the draft amounts to such a promise.

A PPEAL from the Parish Court of the parish of St. Landry. *Morroggh*, judge *ad hoc*. *Thomas H. Lewis*, administrator. *Martel & Hudspeth, Dupre & Garland, Moore & Garland*, for opponents to the tableau of distribution.

WYLY, J. The appellants, *Francois Robin* and *Napoleon Robin*, opposed the tableau filed by the administrator, because they are not placed thereon as special mortgage creditors for \$731 86. The court held that their claim, evidenced by a judgment, is prescribed, more than ten years having elapsed and no revival thereof had, pursuant to the act of 1853.

It is conceded that the judgment was not revived in ten years, as required by the statute; but the appellants contend that the current of prescription has been interrupted, because, before it had accrued, execution twice issued, and also the former administratrix impliedly acknowledged the judgment by giving her draft in settlement thereof, which was not paid. "The act of 1853, fixing the prescription of judgments at ten years from their rendition, also provides the only means by which it can be averted." *Byrne, Vance & Co. v. Garratt, executor*, 23 An. 587. See also *Bertrand Drogre v. Charles Moreau and wife*, 23 An. 173; *Arrowsmith v. Durell*, 21 An. 295; *Walker v. Hays*, 23 An. 176.

That the prescription of a judgment can only be averted by complying with the requirements of the act of 1853, we regard no longer an open question.

It is therefore ordered that the judgment appealed from be affirmed with costs.

ON THE MOTION FOR A REHEARING.

LUDELING, C. J. The appellant relies upon section 2818 of the Revised Statutes of 1870 to sustain his position; that the course of prescription had been interrupted by the giving of a draft by an administratrix of a succession to pay a judgment against the deceased. The section is in the following words: "Thereafter parol evidence shall not be received to prove any acknowledgment and promise to pay any judgment, sentence, or decree of any court of competent jurisdiction, either in or out of this State, for the purpose or in order to take such judgment, sentence or decree out of prescription, or to recover the same after prescription has run or been completed; but in all such cases the acknowledgment and promise to pay shall be proven by written evidence signed by the debtor himself, or his specially authorized agent." The written acknowledgment and promise to pay spoken of in this section is to be made by the debtor himself, or his specially authorized agent.

It is manifest that an acknowledgment and promise to pay by an administrator is not an acknowledgment and promise by the debtor himself, or by his specially authorized agent, even if the draft given by the administratrix for the payment of the judgment, with the right of subrogation to the drawee, can be regarded as an "acknowledgment and promise to pay the judgment." But we do not consider the draft amounts to a promise to pay the judgment.

We do not, therefore, deem it necessary to decide, in this case, whether or not the section 2818 of the Revised Statutes of 1870 is repealed by the article 3547 of the Revised Civil Code.

The rehearing is refused.

 Millard v. Smith, Administrator, et als.

No. 775.

EDWARD M. MILLARD v. JOHN F. SMITH, Administrator, et als.

25	491
111	384
25	491
113	454

The language: "I have no objection to the payment of the within note," is unambiguous, and the testimony to establish something else than is imported by the language, was properly excluded.

Besides, such an indorsement, as above mentioned, on the note of a deceased person, was not an engagement on the part of the administratrix of the estate to pay the debt. This is immaterial, however, as the note was prescribed at the time of said indorsement.

Parol evidence is inadmissible to prove an acknowledgment or promise of a deceased person to pay a debt, in order to interrupt prescription.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *T. H. Lewis*, acting judge. Jury trial. *Martel & Hudspeth*, for plaintiff and appellant. *Bailey & Estelette*, for defendants and appellees.

LUDELING, C. J. This is an action against the administrator of the succession and the heirs of Clemence Guilbeau for two thousand dollars, and interest from twenty-ninth of April, 1859, on the grounds that Clemence Gilbeau had assumed the payment of a note executed by her deceased husband for said sum, and that she had also rendered herself liable for the debt by disposing of property belonging to the succession at private sale, and by otherwise intermeddling with the property of the succession; and that the heirs had also rendered themselves liable personally for the debt by appropriating property of the succession to their own uses, as well as by promises to pay the debt.

The answers severally contain a general denial and the plea of prescription of five years.

The case was tried by a jury who found a verdict in favor of the defendants: judgment was rendered accordingly, and after an ineffectual effort to obtain a new trial, the plaintiff appealed.

On the trial the plaintiff offered witnesses to prove what Clemence Guilbeau said at the time of and before the signing of the acknowledgment on the note, which was objected to. But the bill of exceptions does not inform us what the objections were, except so far as we can infer them from the reasons of the judge pro tempore for sustaining them. He says: "The words, 'I have no objection to the payment of the within note,' and signed by Clemence Guilbeau in her private capacity, leaves in doubt the question as to whether the signer intended to bind herself in her personal or in her fiduciary capacity; there is, therefore, a latent ambiguity. Any statement by the signer made previously or subsequently, and made in reference to the signing, is admissible to explain the ambiguity. Vague statements, not having direct reference to the indorsements are not admissible." To this ruling the plaintiff excepted. If by the above statement the judge pro tempore meant that it was competent to prove

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what was said at the time of signing the acknowledgment or before, in order to show whether Clemence Guilbeau signed it in her fiduciary capacity or not, we fail to perceive the importance of the evidence; for, in either event, there is no assumption to pay the debt. If, on the other hand, it was meant that the terms of the indorsement are ambiguous, and the testimony was intended to explain it, we can not concur in this view.

The language—"I have no objection to the payment of the within note"—is unambiguous, and the testimony to establish something else than is imported by the language, was properly excluded.

Another bill of exception was taken to the ruling of the judge receiving the testimony of the plaintiff on the grounds that a promise to pay the debt of another can not be proved by parol, and that parol evidence is inadmissible to prove anything against or beyond what is contained in the written indorsement on the note. The judge received the testimony on the ground that it was intended to explain some ambiguity in the writing. We have already said that we do not perceive any ambiguity in the indorsement. The objections should have been sustained. The statute of 1858, R. S. 2820, provides that "parol evidence shall not be received to prove any promise to pay the debt of a third person," etc. The object of the evidence was obviously to prove such a promise or undertaking. *Groves v. Scott*, 23 An., 690.

And it was intended to prove something beyond, and different from the written act of the deceased. Article 2276 of the Civil Code declares that parol evidence shall not "be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, nor since."

The plaintiff offered to prove by parol that certain payments were made, at dates indicated by indorsements made on the note, by the plaintiff and holder, with a view to establish an interruption of prescription. This was objected to on the ground that parol evidence was inadmissible to prove an acknowledgment or promise of a deceased person to pay a debt in order to interrupt prescription. The objection was correctly sustained. In succession of *Heldebrandt*, we said: "The act of 1858, referred to, requires a certain kind of evidence to establish the express renunciation of prescription. We apprehend the same character of evidence is required to establish the fact creating the presumption of acknowledgment, or tacit renunciation." 21 An. 351; 23 An. 549, *Broussard v. Breaux*, and 23 An. 531, *Pavy v. Escoubas*.

On the merits we think the judgment of the lower court correct. The indorsement on the note is not an engagement on the part of Clemence Guilbeau to pay the debt. And whether it be regarded as an acknowledgment of the debt of the succession which she was administering, or not, it is immaterial, as at the time it was made, the

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note was prescribed. An administrator can not revive a debt already extinguished by prescription. 21 An. 373; 23 An. 194, *Flanner v. Lecompte et al.* Neither did Clemence Gilbeau render herself liable for the debt by intermeddling. She was the regularly appointed administratrix of the estate, and could not, therefore, have been an intermeddler. The plea of prescription must be maintained.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

 No. 772.

HALL, RODD & PUTNAM v. LOUIS V. CHACHERE, Sheriff, et als.
MILLER & FORESTIER, Intervenors.

25	493
50	906

Where Harwell sold to Mathews a plantation and slaves, who executed certain mortgage notes in favor of said Harwell or order, and subsequently mortgaged said property to Hall, Rodd & Putnam, to secure a debt due them, and then retransferred the property to Harwell, his vendor, who, as a part of the consideration of the retrocession to him, assumed to pay the notes executed by Mathews for the price of the first sale and transferred to third parties by Harwell—two of which notes were redeemed by said Harwell and transferred to Perret, these two notes were extinguished on their return to the possession of Harwell, after he had assumed their payment in the contract with Mathews, by which he repurchased the plantation for which the notes had been given.

If conceded that Harwell could reissue the notes, he could not have revived the mortgage by this reissuing. Mortgages are not subject to the rules of the commercial law by which the rights and obligations of parties to commercial paper are fixed.

The plea that a part of the price bid at the sheriff's sale was for slaves contrarily to the jurisprudence of this State, can not be allowed when, to all intents and purposes, the sheriff's sale has become an executed contract, and the contest between the parties relates only to the distribution of the price.

Where the appellant, since the appeal was taken, has paid the judgment in favor of any of the appellees, this is an abandonment of the appeal as to them.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *T. H. Lewis*, Acting J. *Joseph M. Moore*, for plaintiffs and appellees. *John H. Overton*, for defendants and appellants. *Henry L. Garland*, for intervenors.

LUDELING, C. J. This suit was commenced by third opposition on the part of the plaintiffs, claiming to be paid by preference out of the proceeds of the sale of certain property, seized and sold as the property of one Harwell, under executions issued under judgments in favor of Miller & Forestier, and Posey, agent of Frank Perret, against said Harwell.

It appears, from the record, that Robert R. Harwell sold to Archibald Mathews a plantation and slaves for \$34,000—\$8000 cash and the remainder in four installments, for which Mathews executed his mortgage notes in favor of Harwell or order. One of these notes, for \$8000, was transferred to Perret shortly after the sale; two of them were pledged by Harwell with Clark, and the other was also transferred, but it does not appear to whom.

In March, 1855, Mathews mortgaged the property bought by him to Hall, Rodd & Putnam to secure a debt due them, and then he retransferred the property to Robert R. Harwell, who, as a part of the consideration of the retrocession to him, assumed to pay the notes (executed by Mathews for the price of the first sale), which he had then disposed of as aforesaid. After the retransfer to Harwell, Miller & Forestier obtained judgment against him, and recorded their judgment in the parish where the property is situated. Perret also obtained judgment on the note for \$8000, which he held, recognizing his mortgage, and against Harwell personally. Miller & Forestier caused execution to be issued under their judgment on the twenty-sixth of November, 1858, and a few days thereafter Perret caused an execution to be issued under his judgment. The property was sold under these executions, and Perret bought it for \$23,000. The execution of Perret was credited with the amount for which it issued, and he retained the balance of the price bid to pay the special mortgages, appearing to exist on the property.

It further appears that the two notes, which had been pledged to Clark, were redeemed by Harwell, and transferred to Perret.

The main contest is concerning the effect of the return of these two notes to the possession of Harwell, after he had assumed their payment in the contract with Mathews, by which he repurchased the plantation for which the notes had been given. If they were extinguished when they were returned to his possession, by payment or otherwise, the fund to be distributed will be ample to pay all the contesting creditors.

What, then, was the effect of the obligation of Harwell towards Mathews, in regard to the mortgage notes given by him? Clearly he assumed Mathews' obligation to pay the notes; and when he acquired them, he discharged the obligation assumed by payment. If, on the other hand, he was always the owner of said notes, they were extinguished by confusion so soon as he assumed the obligation to pay them. "When the quality of debtor and creditor are united in the same person, there arises a confusion of right, which extinguishes the obligation." C. C. 2217. The principal obligation being extinguished, the accessory obligation necessarily ceased to exist. And conceding that Harwell could reissue the notes, it is clear he could not have revived the mortgage—merely by reissuing the notes. Mortgages are not subject to the rules of the commercial law by which the rights and obligations of parties to commercial paper are fixed. 4 R. 416; 20 An. 264, Dale v. Risotti.

It is, however, contended, that a part of the price bid was for slaves, and that, under the jurisprudence of this State, to this extent the purchaser is entitled to relief. The sale was for cash. The adjudicatee

Hall, Rodd & Putnam v. Chachere, Sheriff, et als.

complied with his bid and received the title and the property. The undistributed portion of the price was held subject to the order of the court. To all intents and purposes, the sheriff's sale is an executed contract—and this contest relates only to the distribution of the price.

It appears that since the appeal was taken, the appellant has paid the judgment in favor of Hall, Rodd & Putnam. This is an abandonment of the appeal as to them.

It is therefore ordered and adjudged, that the appeal be dismissed as to Hall, Rodd & Putnam; and that, as to the other appellees, it be affirmed, with costs of appeal.

No. 780.

DANIEL MCDANIEL v. ANGELINA STOVAL, WIFE, et als.

Where the suit is brought on a mortgage note against the drawers thereof and the indorser who transferred it to plaintiff, and to enforce the plaintiff's hypothecary action against the property mortgaged, which is in the hands of third persons, the defendants in this case, and it appears that, before the act of mortgage was recorded in the mortgage records of the parish, the purchaser against whom the mortgage existed, exchanged the property for another with D, who was a witness to the original act of sale, and whom defendants have called in warranty;

Held—that, D being a witness to the act of mortgage was not a third person in the sense in which the terms are used in articles 3342, 3343, C. C.

Besides, it appears that the mortgage was recorded long before the property was acquired by defendants.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *E. T. Lewis*, acting judge. *James M. Moore*, for plaintiff and appellee. *H. L. Garland*, for defendant and appellant.

LUDELING, C. J. This is an action against the makers and indorser to enforce payment of a mortgage note, executed by John S. Barlow, and A. J. Barlow, in favor of J. B. Fontenot, who indorsed it to plaintiff, and to enforce the plaintiff's hypothecary rights against the property mortgaged, which is in the hands of third persons.

The answers are general denials, with a case in warranty on the part of Mrs. Stoval.

There was a judgment in favor of the plaintiff against the makers and indorser for the amount claimed, and making the mortgage executory against the mortgaged premises in the hands of Angelina Stoval and her husband. The third possessors alone have appealed.

The only question involved in this case is, whether or not the mortgage aforesaid can have effect against the third possessors.

On the twentieth of February, 1857, Jean B. Fontenot sold to John S. Barlow the property, now in the possession of Mrs. Stoval and her husband. To secure the payment of the price, a mortgage was retained on the property. This act was not recorded in the mortgage records of the parish until the thirteenth of September, 1858.

McDaniel v. Angelina Stoval, Wife, et als.

In the meantime, to wit, on the fourth of November, 1857, the purchaser of this property exchanged it for another piece of property, with James McDaniel, who was a witness to the original act of sale between Fontenot and Barlow. The appellants contend that inasmuch as the mortgage was not registered until after the purchaser had transferred it to McDaniel, the mortgage could have no effect against them. We think otherwise. McDaniel was a witness to the act of mortgage—he is not a “third person” in the sense in which the terms are used in article 3342 of the Civil Code, C. C., 3343.

And long before the appellants had acquired the property, the mortgage was duly registered; and it has been kept in force by reinscription. There is no error in the judgment.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed with costs of appeal.

Rehearing refused.

No. 785.

LEVY & SCHERER v. SOLOMON LOEB.

Where promissory notes were offered in evidence, properly stamped, with the approval of the United States officer whose duty it was to stamp such notes, they were admissible, and it formed no part of the duties of the State court to inquire whether or not the United States officer had done his duty. It was sufficient to show that the notes were stamped with the approval of the said officer.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *G. W. Hudspeth*, acting judge. *Joseph M. Moore*, for plaintiffs and appellees. *Lewis & Brother*, for defendant and appellant.

LUDELING, C. J. This is an action on several promissory notes. There was judgment for plaintiffs, and the defendant has appealed.

The only question in the case arises from the bill of exception to the reception of the notes, and it is this: that the notes, which had insufficient stamps, had been withdrawn from the suit with permission of the court, and additional stamps had been affixed and canceled by the collector of internal revenue, without having first exacted the full penalty of the law for having failed to place and cancel sufficient stamps thereon. We think the court *a qua* did not err. When the notes were offered in evidence properly stamped, with the approval of the United States officer whose duty it was to stamp such notes, they were admissible in evidence; and it formed no part of the duties of the State court to inquire whether or not the United States officer had done his whole duty. It was sufficient to know that the notes were stamped with the approval of the said officer. 22 An. 131.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with costs of appeal.

Mouton v. Broussard.

No. 766.

EDGAR MOUTON v. ZENON BROUSSARD.

25	497
125	816

Where, on the verdict of the jury being rendered, the defendant moved for a new trial, which was refused, and an appeal was then asked for and granted, and the appeal bond filed, all prior to the date of the judgment as entered on the minutes of the court, in consequence of which a motion was made to dismiss the appeal on the ground that it was premature, having been applied for and granted before the judgment was rendered, and that the bond is defective and without force, because it was given before the judgment was rendered;

Held—That the judge *a quo* having entertained the motion for a new trial and refused to grant it, the defendant may well have considered that the verdict of the jury was adopted as the judgment of the court as of that date. A new trial having been refused, there remained nothing further for the court to do but render a judgment pursuant thereto, and under the mode of procedure in the country, the appeal may be considered as taken *nunc pro tunc*.

The granting of the appeal at the time was an irregularity that does not authorize the dismissal of it.

Where the plaintiff had been allowed to explain by parol the circumstances attending the seizure of which he complains, it was competent for the defendant to produce rebutting evidence in relation to the facts connected with the seizure, which did not tend to contradict, vary, or alter his written return on the order.

APPEAL from the Sixteenth Judicial District Court, parish of Lafayette. *Mouton, J.* Jury trial. *Felix Voorhies, Ed. Eugene Mouton, E. Simon, and J. E. Mouton*, for plaintiff and appellee. *DeBlanc & Fournet*, for defendant and appellant.

TALIAFERRO, J. A motion is made to dismiss this appeal on the grounds that the appeal is premature, having been applied for and granted before the judgment was rendered, and that the bond is defective and without force because it was given before the judgment was rendered.

The case was tried before a jury, and when the verdict was rendered the defendant moved for a new trial which was refused. An appeal was then asked for and granted, and the appeal bond filed—all prior to the date of the judgment as entered on the minutes of the court.

The judge having entertained the motion for a new trial and refused to grant it, the defendant may well have considered that the verdict of the jury was adopted as the judgment of the court as of that date. A new trial having been denied, there remained nothing further for the court to do but to render a judgment pursuant thereto, and under the mode of procedure in the country, the appeal may be considered as taken *nunc pro tunc*. 12 An. 289, 596; 15 An. 521; 23 An. 704. The granting of the appeal at the time was an irregularity that does not authorize the dismissal of it.

The motion is overruled.

ON THE MERITS.

The plaintiff alleges that the defendant caused him damages to the amount of fifteen hundred dollars by illegally seizing, under execution

issued against other parties, the plaintiff's growing crop of the year 1871, by which illegal act he was compelled to abandon his cultivation and suffer the loss of his crop, being about eight arpents and a half of cane and about seven and a half arpents of corn. The answer is a general denial. The case was tried before a jury, and a verdict rendered in favor of the plaintiff for the amount claimed. The defendant has appealed. The facts of the case seem to be that the defendant, a mortgage creditor for a large amount, of Adelina Broussard and Sevigne Broussard, proceeded *via executiva* to seize and cause to be advertised for sale a plantation belonging to his debtors "with all their right, title, interest and demand in the sugar, cotton and corn crops on said plantation." The plaintiff, it seems, was lessee of part of the plantation seized, and was cultivating the leased portion when the seizure was made, the other portion being in cultivation by the owners.

The controversy turns upon the single question whether the plaintiff's crop growing upon the mortgaged premises was embraced by the seizure. The plaintiff and Adelina Broussard say in their testimony that when the deputy sheriff made the seizure he was informed that the plaintiff had his crop on the land, and that inquiry was made of him if the whole crop on the plantation was seized, to which he replied, that it was none of the plaintiff's business, and that if he had any right to the crop seized, he had to go to St. Martinsville, and there make his claim. The sheriff's return on the order of seizure recites clearly that with the land, "all the right, title, etc., of Adelina Broussard and Sevigne Broussard in the sugar, cotton and corn crops on said plantation" were seized.

The deputy sheriff was introduced by the defendant as a witness to prove the manner in which he made the seizure. Objection was made on the ground that his parol statement was not the best evidence the case admitted of, and that his testimony was inadmissible to contradict, vary, or explain the terms of a written instrument, etc. The objection was overruled and a bill of exceptions reserved. We think the reasons of the judge for admitting the evidence are satisfactory. The plaintiff had been allowed to explain by parol the circumstances attending the seizure, it was competent for the defendant to produce rebutting evidence in relation to the facts connected with the seizure, which do not tend to contradict, vary, or alter his written return on the order. His testimony is that he did not seize the defendant's crop, and that he so informed Adelina and Sevigne Broussard at the time; that his instructions to the keeper he left in charge of the plantation were positive that they should not in any manner impede or trouble the lessees in their work on their crop in the plantation.

No interference was made with the Broussards in their cultivation.

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and they continued to work their crop. The instructions given to the sheriff by the attorney of the seizing creditor were to seize only the debtor's property and their interest in the crop. He seized the property pointed out by the debtor and mentioned in the notice of seizure. The plaintiff fails entirely to show that he was in any manner interfered with in the cultivation of his crop. His abandonment of his crop seems to have been an act entirely uncalled for, and in no manner caused by any act of the defendant.

We think the decree of the lower court erroneous.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed.

It is further ordered, that there be judgment in favor of the defendant, the plaintiff and appellee paying costs in both courts.

No. 769.

BODET & GUEYDAN BROTHERS v. JULES NIBOUREL.

Where the amount of the attachment bond is less than one-half over and above the amount of the debt alleged to be owing, by less than one dollar, such a deficiency will not be noticed by this court. *De minimis non curat lex.*

APPEAL from the Sixteenth Judicial District Court, parish of Vermilion. *Mouton, J. R. S. Perry*, for plaintiffs and appellants. *F. R. King*, for defendant and appellee.

TALIAFERRO, J. The plaintiffs' action in this case is founded upon attachment. They claim that the defendant owes them \$1706, with interest, and, under their writ of attachment, caused to be seized a stock of merchandise.

The defendant moved to set aside the attachment on the following grounds:

First—That the attachment bond is insufficient in amount, and not such as the law requires.

Second—That the affidavit is insufficient, and does not meet the requirements of law.

The motion to dismiss was sustained and the suit dismissed.

We think there is error in the judgment. The amount of the bond, it seems, is less than one-half over and above the amount of the debt, alleged to be owing, by less than one dollar. *De minimis non curat lex.*

The affidavit we think sufficiently explicit, and that it authorized the issuing of the attachment.

It is therefore ordered, that the judgment of the district court be annulled and reversed. It is further ordered, that the case be remanded to the court *a qua* for further proceedings according to law, the defendant and appellee paying costs of this appeal.

Marie E. L. J. Frere, Wife and others, v. Corinne Perret, Wife and others.

790.

MARIE E. L. J. FRERE, Wife and others, v. CORINNE PERRET, Wife and others.

Where defendant contended that the terms "*will convert*," instead of "*is about to convert*" her property into money, is too vague and indefinite to authorize the attachment against her;

Held—That the allegations and affidavit in this case substantially comply with the law and justified the attachment.

The essential part of the law is not that the debtor is about to convert her property into money, for there is no wrong in that, but that she will do so, "with the intent to place it beyond the reach of her creditors."

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. F. Gates*, for plaintiffs and appellants. *Tucker, Davis & Simon*, for defendants and appellees.

LUDELING, C. J. The plaintiff sued out an attachment against the defendant under the provisions of the act of 1868, creating additional grounds for attachments. Revised Statutes, section 109. The attachment was dissolved on motion, on the ground that the allegations of the petition were insufficient. The allegations are, that "the defendant had already disposed of and assigned the notes attached, by pledging them for advances, and that she will further assign said notes and convert them into money with the intent to place them beyond the reach of the petitioner, who is creditor." The statute provides that when a party "has converted, or is about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors" they may attach the property. The counsel for defendant contends that the terms "*will convert*," instead of "*is about to convert*" her property, is too vague and indefinite to authorize the attachment; that it refers to the indefinite future, whereas the terms of the law refers to the immediate future.

We deem it unimportant to consider particularly the philological differences between the terms of the law and those of the petition. The Civil Code directs that "the words of the law are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules, as to the general and popular use of the words." Article 14. The essential part of the law is not that the debtor is about to convert her property into money—for there is no wrong in that—but that she will do so, "with the intent to place it beyond the reach of her creditors." We think the allegations and affidavit in this case substantially comply with the law and justified the attachment.

It is, therefore, ordered that the judgment of the lower court be set aside, that the exception be overruled, and that the cause be remanded to be proceeded with according to law. It is further ordered that the appellee pay costs of appeal.

Marie E. L. J. Frere, Wife and others, v. Corinne Perret, Wife and others.

WYLY, J., *dissenting*. As the affidavit is merely that the averments of the petition are true, that instrument must be examined to see whether the plaintiff has shown sufficient grounds for the attachment.

The petition alleges that the plaintiff is a creditor of the defendant for \$4711 90; that the defendant, Corinne Perret, in execution of her judgment against her husband, seized and sold half of a sugar plantation, and that plaintiff became the purchaser for \$13,000; "that said Mrs. Corinne Perret, having pledged her said judgment as collateral to secure the advances made, and to be made by the house of Beraud, Gilbert & Co., your petitioner could not safely pay the price bid, but arranged it with the said Mrs. Perret to pay a certain amount cash, say \$2000, and furnish for the balance her mortgage notes bearing on the property so purchased by her, the said notes to be placed in the hands of Beraud, Gilbert & Co., as a substitute for the judgment pledged, said judgment to be returned with the pledge thereof canceled and transferred to your petitioner—the writ of *fi. fa.* thereupon to be returned satisfied. All of which was done as above set forth.

Your petitioner alleges that Mrs. Corinne Perret, wife, etc., has no other property in her own right, of which your petitioner has any knowledge, except the two notes thus given by her; and further, that she has already disposed of and assigned, by pledging said notes to said Beraud, Gilbert & Co., of New Orleans, and that upon said pledge she has obtained advances of money and supplies, for which said notes are liable in the hands of the pledgees, and that she will further assign said notes and convert them into money for the purpose of placing them beyond the reach of your petitioner, who is a creditor."

I see nothing in these averments to justify the attachment, which was granted. By plaintiff's own judicial confession the pledging of the notes was arranged by herself. It was evidently to her advantage to make the arrangement which resulted in pledging these notes to Beraud, Gilbert & Co., because by it, instead of paying \$13,000 cash on her bid, she only paid \$2000, and gave her notes for the balance of the price.

How the plaintiff arranging, advising, and benefiting by the pledge to Beraud, Gilbert & Co., can now turn around and set up that as a valid ground to issue an attachment against the defendant, I can not imagine. The plaintiff, consenting to the pledge of the notes for supplies furnished, and to be furnished, by Beraud, Gilbert & Co., has no right to complain on account thereof, so therefore, the statement of the fact that the defendant has already "assigned by pledging" adds nothing to the clause "that she will further assign said notes and convert them into money for the purpose of placing them beyond the reach of your petitioner, who is a creditor."

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The statement of a fraudulent disposition of part of the property already made would add great weight to the averment of a creditor that he believed there would be a "further assignment" of property for the purpose of placing it beyond his reach. But where there has been no fraudulent "assignment" the bare averment "that she will further assign said notes and convert them into money," etc., is not sufficient in my opinion to authorize the writ of attachment.

It has repeatedly been held that the remedy of attachment is a harsh one; and the party seeking it must place himself strictly within the requirements of the law. The statute requires an affidavit that the debtor "has converted, or is about to convert, his property into money or evidences of debt with intent to place it beyond the reach of his creditors."

In the petition it is not shown that the defendant has "converted or is about to convert," her property, etc.

There is a marked difference between the averment that the defendant "will convert," and the statement that she is "about to convert." Under the law an attachment will lie if the affidavit shows that the debtor is "about to leave the State permanently," but the averment simply that "he will leave the State," etc., does not meet the requirement of the law, and I apprehend this will not be disputed by any one.

It is true the language of the law is not sacramental, nor is the niceties of grammar material, but words of like import must be used. The word "about" is not meaningless, it indicates the time the contemplated fraud will be perpetrated. A creditor might not be able to swear that his debtor is about to leave the State permanently, while he could safely state that he will leave the State permanently. If the debtor contemplated leaving in six or twelve months, the latter statement could not well be considered false, but not so with the former. The statute requires not only the averment that a fraudulent assignment will be made, but also some indication of the time of making it; that it is about to be made, or that it will immediately be made.

While a debtor is planting his crop, his creditor might have the best reason to believe that when it is gathered (six months hence) he will fraudulently dispose of it.

He might truthfully swear that he will fraudulently dispose of it, (meaning when gathered,) yet he could not swear that he is about to dispose of it.

A liberal construction placed on the law, might possibly justify the conclusion that "will dispose of" means "is about to dispose of," but no liberal construction can be placed on the law of attachment, according to the repeated decisions of this court. Such a law must be construed strictly.

Marie E. L. J. Frere, Wife and others, v. Corinne Perret, Wife and others.

A strict construction of the law, in my opinion, will not justify the conclusion that "will assign" means or is equivalent to the words "is about to assign," etc.

For the foregoing reasons I feel bound to dissent from the opinion of the majority of the court.

No. 795.

ALCEE DUPRE v. J. M. THOMPSON, Sheriff, et al. PETER MARCY, Intervenor.

Where plaintiff whose property, as he claimed, was seized by virtue of a judgment in the suit of Marcy v. McKinney, enjoined said execution and excepted to the right of defendants and intervenor to thus attack his title collaterally, but averred that they must do so by a direct revocatory action contradictorily with all the parties to the tax sales at which he acquired the property, and further excepted that they had neither alleged nor suffered any injury by said sales :

Held—That the court *a qua* erred in maintaining the exceptions of plaintiff to the right of the intervenor and defendants to contest the validity of the tax sales under which plaintiff holds.

The intervenor was the holder of notes secured by a mortgage importing a confession of judgment and containing the pact *de non alienando*, which authorized him to pursue the mortgaged property in the hands of the third possessor, and the latter, when he enjoined him in so doing, assumed the burden of showing that the sale at which he acquired the mortgaged property divested the rights of the mortgagee thereon.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. Henry L. Garland*, for plaintiff and appellee. *Martel and Hudspeth* for defendants and appellants.

HOWELL, J. The plaintiff, as owner, enjoined the Sheriff and his deputy from executing a judgment in the suit of P. Marcy v. K. W. McKinney, on a certain plantation, and from demolishing or removing the houses, fences and cisterns therefrom.

The defendants pleaded a general denial, but admitted the attempt to dispossess the plaintiff by executing, in their official capacity, a writ of fieri facias in the cause of Peter Marcy v. K. W. McKinney, and in an amended answer they aver that all the formalities were observed and notices given in the execution of the said judgment, that plaintiff, asserting a claim to the mortgaged property, was notified as third possessor and the execution proceeded with, the sale under which he claims being void on its face, and McKinney remaining in possession.

Peter Marcy intervened to defend the suit, alleging that he has a judgment against the said McKinney recognizing a mortgage on the property in controversy, on which he caused an *alias fi. fa.*, to issue; that plaintiff, claiming to be the owner, has enjoined the same without making intervenor a party; that plaintiff has no title to said property, his pretended title being derived from two tax sales, made without observing any of the formalities of law and in collusion between him

and McKinney to defraud creditors, and specially plaintiff; that after the said tax sales, intervenor, learning that McKinney, in order to defraud him, had obligated himself to plaintiff not to redeem the said property, did, within the legal delay, offer and tender to plaintiff the amount of the purchase price, principal and interest, costs and penalty, which was refused on the ground that the land could be redeemed only by McKinney; and that, before proceeding with the execution, the notices and demands necessary in hypothecary actions were made and given; and he prayed that the title of plaintiff be declared null, the injunction be dissolved, and plaintiff condemned to pay damages for retaining said property in possession. In an amended petition he avers further that he was joined by said McKinney in the offer to redeem the said land, which offer, within the legal delay, defeated plaintiff's title, which was affected by a resolatory condition; that plaintiff never had possession of the land which remained in McKinney; and he prays that the injunction be dissolved and the sheriff ordered to proceed according to law with the execution.

Plaintiff excepted to the right of intervenor and defendants to thus attack his title collaterally but averred that they must do so by a direct revocatory action contradictorily with all the parties to the said tax sales, and further that they have neither alleged nor suffered any injury by the said sales, as at their dates the said property was affected with a special mortgage, superior to that of intervenor's, in an amount double the value of the property.

It seems that those exceptions were tried at the same time as the merits, and were maintained, and the intervenor and defendants were not permitted to introduce any evidence on the subject; and upon the trial on the other issues judgment was rendered in favor of plaintiff against the defendants and intervenor perpetuating the injunction, from which the latter have appealed.

We are of opinion that the court erred in maintaining the exceptions. The intervenor was the holder of notes secured by a mortgage importing a confession of judgment and containing the pact *de non alienando* which authorized him to pursue the mortgaged property in the hands of a third possessor or owner, and when the latter enjoined him in so doing he assumed the burden of showing that the sale at which he acquired the mortgaged property divested the rights of the mortgagee thereon, and by the jurisprudence of this State, one relying on a tax sale, made prior to the present constitution, must show the existence and legality of the assessment, which stands in such case in lieu of the judgment in ordinary judicial sales; the deed of the tax collector will not be sufficient to establish his title. 6 N. S. 348; 7 L. 50; 10 L. 283; 4 An. 248; 14 An. 209. In a tax sale, every formality of law must be strictly complied with under penalty of nullity, and the only question here is

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whether the observance of these formalities can be inquired into in this form of proceeding, or must the mortgagee, in whose favor there is a pact *de non alienando*, resort to a direct revocatory action, As said above, we can perceive no good reason for requiring a resort to a direct revocatory action. The State can not be made a party, and as to the tax defaulter, the purchasers may be viewed as representing him in relation to the forms of proceeding. If the formalities have been observed, the title is good without reference to the charge of subsequent collusion, and if not observed, the title is not good, whether there was collusion or not. We must conclude that the regularity and validity of the tax sale, in this particular instance, may be raised by the plaintiff in the execution, and for this purpose it becomes necessary to remand the cause. It is unnecessary in this view of the case to pass on the bills of exception in the record.

It is therefore ordered that the judgment appealed from be reversed, that the exceptions of plaintiff to the right of the intervenor and defendants to contest the validity of the tax sale under which plaintiff holds, be overruled, and that this cause be remanded with instructions to the lower court to hear evidence on the subject, and otherwise to proceed according to law.

Plaintiff to pay costs of appeal.

LUDELING, C. J. I concur in the opinion of Mr. Justice Howell. The mortgagee held a conventional mortgage with the "pact *de non alienando*" on the property in controversy.

That clause gave the right to seize the property, into whosoever's hands it passed.

When he exercised this right, he was enjoined by the plaintiff, who alleged he was the owner of the property. This did not authorize the injunction. It is contended that, because the plaintiff in injunction bought at a tax sale, the mortgage was destroyed. That is the very question for decision. And I can not discover any good reason for refusing to permit that question to be determined in this case.

WYLY, J., *dissenting*. The question is, can the title of the purchaser at tax sale be attacked collaterally by a judgment creditor of the former owner, which judgment is based upon a debt secured by mortgage with the pact *de non alienando*?

The sale before us is presumed to be valid, because the officers of the State are presumed to have done their duty in assessing the taxes and in alienating the property to enforce the collection thereof.

If the formalities of law have been observed (which we are bound to

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presume) this sale freed the property of the mortgage now sought to be enforced against it, because the debt for which it was sold is of higher rank than the mortgage. The privilege for taxes is superior to any mortgage granted by the former owner. No one can encumber his property so as to defeat the right of the State to enforce the collection of its revenues.

It is well settled that a sale enforcing a superior mortgage or privilege relieves the property from subordinate incumbrances. A junior mortgage creditor, finding that the property has been sold under a superior mortgage, and believing that the formalities of law were not observed in the foreclosure of the prior mortgage, can not attack the sale collaterally, by seizing the property under his own judgment. He must bring a direct action.

The fact that his mortgage contains the non alienation clause is of no consequence. If the sale under the prior mortgage was formal and the proceedings regular, it wiped out the junior mortgage. It relieved the property entirely of it. The non alienation clause, of course, falls with the mortgage.

The sale under a prior mortgage, unless affected with an absolute nullity, can not be disregarded by a junior mortgage creditor, whether his mortgage contains the pact *de non alienando* or not. For relative nullities it must be attacked in a direct action.

Here the plaintiff is in possession under a recorded title ostensibly valid, and the sale at which he bought was to enforce a debt superior in rank to that of the attacking mortgage creditor.

Until that sale is set aside in a revocatory action, contradictorily with all parties in interest, in my opinion, the mortgage creditor can not proceed to enforce his mortgage; because whether he has a mortgage or not still existing on the property, depends upon the result of the inquiry whether the sale to enforce the superior debt was formal and valid. Until this result is ascertained, in a proper proceeding, the formalities necessary in a tax sale are presumed to have been observed by the officers of the State; and the sale to the plaintiff is presumed to be valid.

It is only simulated sales that may be disregarded; actual contracts, though in fraud of creditors, must be attacked in a direct action.

In my opinion Peter Marcy, the mortgage creditor, has mistaken his remedy. He had no right to seize the property and treat the title of the plaintiff as an absolute nullity.

In this proceeding, which is an injunction suit, he can not assail the title of the plaintiff and have its nullity pronounced, because neither the tax collector nor McKinney, the debtor for the taxes, are made parties. I have never heard of a sale being annulled by a court in the absence of the parties thereof.

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The plaintiff, the purchaser, is the only party to the sale who is before the court, yet it is gravely insisted that it is proper for the court to pronounce the nullity of the sale and thereby destroy the contract, condemning parties without a hearing.

A tax sale is a lawful sale and like every other forced alienation, it is liable to be avoided for relative nullities. But I have yet to learn that the form of proceeding to ascertain these relative nullities is different in a tax sale from that in a judicial sale. Both kinds of sale are made upon the faith of the State. They are not snares laid to entrap honest bidders. The title given by the State, like that acquired at a judicial sale, is presumed to be valid, until the contrary is shown in a legal manner.

A title derived at such sale forms no exception to the universal rule that actual sales can only be annulled in a direct action contradictorily with all the parties thereto.

For the reasons stated I deem it my duty to dissent in this case.

See 23 An. 44, 331; 13 An. 155; 14 An. 560; 17 L. 517; 6 R. 21; 6 R. 152; 14 An. 495; 4 An. 439; 3 L. 476; 1 An. 297; 6 L. 268; 9 L. 542; 4 L. 473; 8 L. 423; 1 L. 491; 11 L. 438.

 No. 800.

ELBERT GANTT v. EATON & BARSTOW.

A prayer in this Court by a defendant, in answer to an appeal taken by his codefendant, that the judgment of the district court be reversed, and the case be remanded for a new trial, is not an appeal, which must be applied for and granted in the court *a qua*. Here is, in fact, a co-appellee, not a codefendant, and between appellees a judgment is not to be disturbed.

The jurisdiction of the court of the parish where property is sought to be made liable in an hypothecary action, can not be questioned.

Where a judgment was rendered for more than the petition claimed, the *remittitur* should have been entered before the judgment was signed, and should have appeared in the transcript.

There is no reason why the purchasers of property should not legally bind themselves *in solido* for the payment of the price; if the act of sale does not stipulate solidarity, and the notes do, this is sufficient. Parties may bind themselves as they see fit, and, as they bind themselves, so must they be held.

The plea that an agent had no right to stipulate the solidarity of the obligation sued on, is a matter of special defense, which should have been set up in defendant's answer. It can not be urged in error to a judgment rendered and confirmed by default.

Where the act of sale, which was offered in evidence, contained the recital of a power of attorney, and the power was not denied, the act was sufficient to prove what it related.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. B. A. Martel & Hudspeth*, for plaintiff and appellee. *Albert Voorhies* and *Henry L. Garland*, for defendants.

MORGAN, J. Plaintiff sold to Eaton & Barstow, commercial co-partners residing in the city of New Orleans, a certain plantation,

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situate in the parish of St. Landry. The consideration of the sale was part cash and part in promissory notes. In so far as Eaton was concerned the purchase was made by Barstow under a power of attorney. The notes given were made in solido by the makers. Since the sale Barstow has been living in St. Landry; Eaton lives in New Orleans.

This suit was instituted in January, 1872. Its object is to recover from the defendants; in solido, the amount of one of the notes for \$10,000, which formed a part of the purchase price, less some payments thereon, which the petition admits have been made; to cause his mortgage and vendor's privilege on the land sold, and which was in possession of the defendants at the time the suit was instituted, to be recognized, and asking that the same be sold to satisfy his debt.

Barstow was served personally in the parish of St. Landry. Eaton was served by leaving a copy of the petition and citation at his domicile in the city of New Orleans. Neither party filed answers. Default was entered against them. The default was confirmed and made final, and a judgment rendered against them in solido for \$10,000, with interest at eight per cent. from first January, 1870, less the following credits: \$800 interest paid first January, 1871; \$3000 paid February 6, 1871; \$2000 paid twenty-fourth February, 1871, and \$500 paid March 18, 1871. He was also decreed to have a special mortgage and vendor's lien on the property sold, and it was ordered that the property be seized and sold according to law, for an amount, in cash, sufficient to pay the mortgage note sued on, with costs, and all mortgage notes then due and unpaid, and bearing upon the property, and on a term of credit to correspond with the installments of the purchase price yet to fall due, to wit: \$10,000 due January 1, 1873.

From this judgment Eaton appealed. He made Barstow a party to the appeal, who, in his turn, in this court, prays that the judgment be reversed. As regards him, we can not interfere. He has not appealed, and we have no authority to question a judgment rendered against him of which he does not complain. It is true, as above stated, that in this court, in answer to the appeal taken by his codefendant, he prays that the judgment of the district court be reversed and the case remanded for a new trial, but this is not an appeal which must be applied for and granted by the district judge. In fact, he is a co-appellee, and between appellees, the judgment is not to be disturbed.

Eaton contends that the judgment must be reversed as to him, because he is a resident of the parish of Orleans, and the District Court of the parish of St. Landry was without jurisdiction over him. He relies upon article 162 C. P.; 21 An. 258; 23 An. 255.

In our opinion the case is governed by article 163 C. P.; 2 N. S. 374; 4 L. 240; 3 An. 637; 15 An. 346. And it can not be distinguished

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from the case of *Generes v. Simon*, 21 An. 653, which followed the decisions above quoted, all of which maintained the jurisdiction of the court of a parish where the property was sought to be made liable in a hypothecary action.

He contends that the judgment under appeal has none of the characteristics of a real or hypothecary action; that it is strictly *in personam*, recognizing the existence of the mortgage, and to support the proposition, that, under such circumstances, the defendant must be sued at his domicile, he refers to several authorities. We do not contest the correctness of the decisions referred to. But we think the learned counsel for the appellant is mistaken in his conclusion that the judgment in question has none of the characteristics of an hypothecary action. The prayer of the petition, in terms is, that the property described be declared subject to the mortgage, and that it be sold to satisfy the same.

His second objection is that the judgment was rendered for more than the petition claimed. It seems to be conceded that credit was not given in the judgment of \$2000 paid on the note of the fifteenth February, 1871, and in this the appellant has cause to complain. The appellee contends that he has entered a *remittitur* for this amount. But this does not appear in the transcript of appeal, and although it appears by a document attached to appellee's answer to the appeal, to have been filed in the Recorder's office, this is not sufficient; we can not notice it. The *remittitur* should have been entered before the judgment was signed, and should have appeared in the transcript. This, however, is no ground, for the reversal of the judgment. It is a good ground upon which to reduce it.

He next contends that the suit was prematurely brought, before the compliance on the part of the plaintiff with his stipulations in the act of sale as to the last installment of \$10,000. The act provides that the note shall not be due and payable until Gantt shall have made a satisfactory title to a certain portion of the property sold by him to the defendants, and which he had purchased at sheriff's sale, in the suit of *Bentley v. McCamet*, and the mortgage resulting from the judgment of *Garland v. King* and Gantt should have been removed. There was error in that portion of the judgment which ordered the property to be sold on a term of credit to meet this payment. The amount was not due, and might never become due. But this defect in the judgment may be corrected here.

It is further contended that the property having been purchased for planting purposes, the partnership was an ordinary one, and that the defendants are bound jointly, and not in *solido*.

Real estate purchased by commercial partners, does not make the partners commercial partners with reference to the estate purchased;

they are ordinary partners. But while the partnership may be an ordinary one, the obligations of the partners with reference to the purchase of the estate may be solidary. Parties may bind themselves as they see fit, and as they bind themselves so must they be held. We see no reason why the purchasers of property can not bind themselves in *solido* for the payment of the price. He contends that the act of sale does not stipulate solidarity. But the notes do, and this is sufficient. He contends further that Barstow had no right, as agent of John Eaton, to stipulate the solidarity of his obligation. This was a matter of special defense which he should have set up in answer to the demand which was made upon him. It can not be urged as error to a judgment rendered and confined by default. Neither was it necessary, as is contended, that he should have introduced the power of attorney from Eaton to Barstow under which the plantation was purchased. The act of sale, which was offered in evidence, contained the recital of the power of attorney, and as the power was not denied, the act was sufficient to prove what it related.

The last ground urged for a reversal of the judgment is that the plaintiff failed to produce the last note of \$10,000, which he alleges he had in his possession, and on which the judgment ordered the sale of the property. The answer to this objection is, we think, that suit was not instituted on this note, and that the property is not ordered to be sold to pay it.

It is therefore ordered, adjudged and decreed that the judgment of the District Court as to the defendant Barstow be affirmed. It is further ordered that as to the defendant Eaton it be amended by reducing the judgment on the note sued on two thousand dollars in addition to the sums already credited thereon; and that as to that part of the judgment which decrees the sale of the property to be made on a credit, in order to meet the payment of the last note of \$10,000, forming part of the purchase price, that it be amended so as to make it correspond with the terms of the sale, to wit: until the plaintiff shall have made a satisfactory title to the sixty-eight acres of land purchased by him at sheriff's sale, in the suit of Bentley v. McCamet, and the mortgage resulting from the judgment of Garland v. King and Gantt shall have been removed.

It is further ordered that as between the plaintiff and appellee and Eaton, the costs be borne by the appellee.

Banker v. Durand, Jr., et al.

No. 805.

GEORGE W. BANKER v. CHARLES DURAND, JR., et al.

The plea of prescription, filed by the administrator, can not extend its benefits to the heirs of age and the widow. As to the succession and the minors, it does—their interest being in the succession, and the succession being represented by the administrator, whose duty it is to interpose any legal defense in his power to a suit in which the succession he represents is interested.

Where the heirs neither expressly nor tacitly have accepted unconditionally the succession of their ancestor, but where, on the contrary, on their being sued, they expressly circumscribed their liability, as they had a right to do, to the value of their ancestor's estate, a judgment which, under such circumstances, condemns them personally is erroneous.

In the laws of the United States or proclamations of the President prohibiting, during the late war, any intercourse and trade between persons residing within the Federal and Confederate lines, there is nothing which could prevent a French citizen from acknowledging a debt and agreeing to pay it, and mortgaging his property to secure its payment.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Train, J. Edward Simon*, for plaintiff and appellee. *J. E. Mouton* and *Z. F. Fournet*, for defendants and appellants.

MORGAN, J. Charles Durand, a French citizen, died in the parish of St. Martin on the twenty-sixth November, 1870. He left a widow and several children, of whom several were minors and some majors, and one was an absentee. The widow notified the probate court of the parish of St. Martin of her husband's death, and prayed to be allowed to qualify as natural tutrix to her minor children, and asked for the appointment of an under tutor. Her petition was granted, and an inventory was ordered to be taken of the succession of her husband. Both tutrix and the under tutrix took the oath required by law on the thirty-first December, 1870. The inventory was taken on the twentieth December, 1870. Among the property of the deceased, mentioned in the inventory, was a plantation situate in the parish of St. Martin.

Banker, the plaintiff, a resident of the parish of Orleans, instituted proceedings *via executiva* against the above mentioned property on the thirty-first December, 1870, claiming to be the owner of two promissory notes, drawn by Durand to his own order and by him indorsed, each for the sum of \$7500, dated New Orleans, third May, 1862, and payable respectively on the third July, 1863, and on the first May, 1864, with interest at eight per cent. per annum from maturity till paid, to secure the payment of which, together with counsel's fees at the rate of five per cent., he mortgaged the property referred to. He prayed for an order of seizure and sale against the property for the amount alleged to be due on said note at the time the suit was instituted. He cited the heirs of age residing in the State personally, the one residing abroad through a curator, and the minors through their tutrix.

Subsequently, to wit: on the thirteenth March, 1871, he changed his proceedings from the *via executiva* to the *via ordinaria*, and the same

Banker v. Durand, Jr., et al.

parties were again proceeded against, as widow, tutrix and heirs, and again cited in the manner prescribed by law. The widow and tutrix filed a general denial. The heirs of age denied any indebtedness, and further denied that they could be made responsible for their ancestor's debts, whose succession they, in their answer, accepted only with benefit of inventory. This answer was filed on thirteenth April, 1871.

Subsequent to these proceedings, an administrator was appointed to the succession of Durand. He appeared in the suit, and pleaded the prescription of five years. The other defendants do not make the plea. As regards the heirs of age and the widow, the plea can not extend its benefits to them. As to the succession and the minors, it does, their interest being in the succession, and the succession being represented by an administrator—for it will be observed that the widow did not ask to administer the succession of her deceased husband as natural tutrix to her minor children; she merely asked to be confirmed as their natural tutrix, and, as tutrix, to cause an inventory of the property left by her deceased husband to be taken. The administrator was qualified only a short time before the plea of prescription was filed; and, in his brief, counsel for appellee doubts "that an administrator, made so only two days before the judgment was signed, not a party therefore to the suit, without interest in the suit, can be allowed to come in by appeal to urge such defense." We think differently. The administrator could make no appearance until he was duly qualified, and, when qualified, it was his duty to interpose any defense to a suit in which the succession he represented was submitted, which the law placed in his hands; and as, by the law, he could have filed the plea in this Court at any time before the case was instituted, we do not see how he could have been deprived of the right of filing the plea before any judgment had been rendered in the court of the first instance, even if his right to do so had been contested, which we do not find from the record was done.

As we have heretofore seen, the notes sued on fell due respectively on the first July, 1863, and first May, 1864. On one of the notes, a payment is alleged to have been made on the twentieth November, 1865; on the second, a payment is alleged to have been made on the twenty-sixth March, 1869. The demand is for the balance due on the notes.

In our opinion the letter of Durand of the seventeenth December, 1866, to North, Duthil & Co., and his letter to G. W. Banker, Jr., of twenty-fourth December, 1867, are acknowledgments of the debt, and take the case out of prescription. In the first letter, after expressing his disappointment at the result of his crop, he says: "Donc je me trouve dans l'impossibilité de payer cette année les \$7500 que je dois à M. Duthil. J'ai sujet d'espérer que je serai plus heureux dans le

produit de ma récolte prochaine. Ainsi, mes chers Messieurs, je vous prie de m'accorder un an, en vous payant les intérêts à l'échéance de cette dette. Avec l'espoir que vous adhérez à ma demande, et confiant dans les bonnes dispositions d'anciens amis, Duthil, je suis," etc. This was an acknowledgment of the debt, a confession of his inability to pay, the expression of a hope that he would be able to pay the following year, a promise to pay the interest, and a request for indulgence.

The same may be said with regard to his letter to Messrs. G. W. Banker & Co. of the twenty-sixth December, 1867. He says: "Votre lettre du seizième courant, m'est parvenue hier, par laquelle vous me demandez les paiements de mes billets \$7500. Je n'ai, comme tout notre pays, fait aucun revenu cette année par rapport à l'inondation pour une partie des mes cannes, et le ravage des chenilles dans mon coton. Il faut que je sois ici par le premier de Janvier prochain, pour régler avec mes affranchis, et renouveler leurs contrats pour la prochaine année, la quelle doit me produire audessus de trois cents boucauds de sucre. * * * Aussitôt ces tribulations terminées, je descendrai en ville, ce qui arrivera dans les premiers jours de Janvier prochain; et là je ferai tout mon possible pour répondre à votre demande."

It is contended that, in the first letter, mention is made of a debt due to Duthil, and it is suggested that it is not the debt due to Duthil which is sought to be enforced. But this is explained by the testimony, received without objection, by which it appears that the notes, sued on originally, belonged to Dupasseur; that they were, by him, transferred to North, Duthil & Co., and by them transferred to Banker.

The plea of prescription can not prevail.

The next objection is, that Mrs. Durand, when cited as tutrix of her minor children, had not been legally confirmed in their tutorship.

In this, there is error. The suit *via executiva* was instituted on the thirty-first December, 1870. On the same day the tutrix qualified. This was sufficient. But long after, when the proceeding was changed to the *via ordinaria*, she was again cited. This was done after she had taken her oath.

The next defense is that heirs, under benefit of inventory, can not be held responsible, personally, for the debts of a succession. To a certain extent this is true. Heirs are not responsible, beyond the amount of the property which they inherit, for the debts of their ancestor, provided they accept with the benefit of inventory. They may renounce. They may accept purely and simply; they may accept unconditionally, and this they may do at any time, unless they have done some act which precludes them; and this tacitly when they do some act which necessarily supposes their intention to accept, and which they would have no right to do but in their quality as heirs.

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They accept expressly when they assume the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding.

In the case at bar, neither expressly nor tacitly have the heirs accepted, unconditionally, the succession of their ancestor. On the contrary, when sued, they expressly circumscribe their liability, as they had the right to do, to the value of their ancestor's estate. The judgment, therefore, which condemns them personally, is erroneous.

The last objection is, that the contract between Durand and Dupasseur, on which plaintiff's claim rests, was entered into in disregard of the laws and proclamations prohibiting, during the late war, any intercourse and trade between persons residing within the Federal and Confederate lines.

The debt was created on the third May, 1862, at New Orleans. The debtor, at least, was a citizen of France, and we know of no law of the United States or proclamation of the President, which, at that, or any other time, prohibited a French citizen from acknowledging a debt, and agreeing to pay it, and mortgaging his property to secure its payment.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be so amended as to limit the liability of the heirs of Durand to the value of the estate of Charles Durand; and that, as thus amended, the judgment be affirmed; the costs in the court below to be paid by appellants; the costs here to be paid by appellee.

Rehearing refused.

No. 802.

FANNY E. LEMOINE, Wife, v. JAMES POWERS.

The remaining portion of the unpaid price of community property acquired during marriage is a community debt, and this debt is secured by the vendor's privilege. Where this privilege existed anterior to the wife's tacit mortgage, which commenced only from the time her husband became her debtor, it can not of course be controlled by it.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Thomas H. Lewis*, acting judge. *Henry L. Garland*, for plaintiff and appellant. *J. J. Morgan*, for defendant and appellee. *Joseph M. Moore*, for warrantor.

MORGAN, J. Plaintiff alleges that on the twenty-fifth August, 1865, her husband received \$1000, and on the thirtieth August \$4212 56, in all \$5212 56; all of which was money belonging to her. That she obtained judgment against her husband for this sum, a great part of which remains unsatisfied.

She brings suit against the defendant, alleging that he holds property upon which she has a tacit mortgage, recorded in accordance

Fanny E. Lemoine, Wife, v. Powers.

with the requirements of the law, for the restitution of this debt due her by her husband.

During their marriage (twenty-eighth January, 1857,) plaintiff's husband purchased a plantation from Taylor, in part payment of which he gave his promissory notes secured by mortgage and vendor's privilege on the property sold. The notes were not paid at maturity. They were sued upon; judgment was rendered against him; the property mortgaged was sold in satisfaction thereof by the sheriff, and was purchased by Donnell; Donnell sold to Powers.

The property was acquired during marriage; it was therefore community property. The remaining portion of the unpaid price was a community debt. This debt was secured by the vendor's privilege; this privilege existed anterior to the wife's tacit mortgage, which commenced only from the time her husband became her debtor, and can not be controlled by it.

The judgment appealed from is correct. It is therefore affirmed, with costs.

No. 811.

ELIZABETH MCWATERS, Wife. et al. v. ARPHA M. SMITH, et al.

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A judgment can, of course, be enforced pending a devolutive appeal, and the reversal of the judgment in no manner impairs a sale made under the execution, but the right of the successful appellant is against the proceeds.

When, on the rendition of a judgment, or immediately thereafter, an order for a devolutive appeal is obtained, the party obtaining it is not bound to give the bond immediately in order to preserve his right to said appeal.

A devolutive appeal may be taken at any time within twelve months, and this right is in no manner affected by any disposition the judgment creditor may choose to make of his judgment.

If a sale should take place pending a devolutive appeal, and said appeal taken within twelve months, it is considered pending from the time when the judgment was rendered.

The judgment can not have effect on the thing sold, but operates on the proceeds. The plaintiff is entitled to the amount of the difference between the proceeds of the sale of her property pending the appeal and the amount of the final judgment obtained.

APPEAL from the Third Judicial District Court, parish of St. Mary.
Train, J. Donelson Caffery, for plaintiffs and appellants. *F. Gates*
and *R. N. McMillan*, for defendants and appellees.

WYLY, J. On third November, 1866, Mrs. Arpha M. Smith obtained judgment in the district court against the plaintiff, Mrs. McWaters, for \$20,872 32, with a recognition of a mortgage on the land described in the petition.

From this judgment a devolutive appeal was taken. This Court reversed the judgment, and remanded the case for new trial, with certain instructions. At the trial on the remandment Mrs. Smith only had judgment against Mrs. McWaters for about \$4205.

Elizabeth McWaters, Wife, et al. v. Arpha M. Smith, et al.

In the meantime, that is to say, between the time of the rendition of the first judgment by the district court and the time of its reversal by this court, Mrs. Smith caused execution to be issued on the judgment which she had against Mrs. McWaters, and purchased thereunder the plantation hypothecated and against which the foreclosure of the mortgage was ordered, bidding therefor \$21,050, which sum was credited on the execution.

Subsequently, to wit: on the tenth day of June, 1870, Mrs. Smith, by notarial act, transferred this property to her son-in-law, William W. Johnson, for \$10,000, stated in the act to be cash, and \$2500 on credit, evidenced by two notes executed by the purchaser.

After judgment in the district court on the remandment, wherein the claim of Mrs. Smith was reduced from \$20,872 32 to \$4205 32, Mrs. McWaters brought this suit to recover from her \$15,055 51, the difference between the amount of her bid for the property and the amount subsequently ascertained to be due her. She also sued to annul the sale to Johnson on the grounds of simulation and fraud, claiming a vendor's privilege on the property in controversy.

The court dismissed the suit, and the plaintiff, Mrs. McWaters, appeals.

Of course a judgment can be enforced pending a devolutive appeal, and the reversal of the judgment in no manner impairs the sale made under the execution; but the right of the successful appellant is against the proceeds.

Therefore Mrs. McWaters may demand the proceeds of the sale of her property (beyond the amount subsequently ascertained to be due) which was sold pending her devolutive appeal. But Mrs. Smith contends that, as Mrs. McWaters had not completed her devolutive appeal by giving bond till after the adjudication of the property to herself under her judgment, there was no appeal pending at the time of the sale; that the judgment was acquiesced in, and therefore *res judicata*. Consequently she is precluded from recovering the amount claimed. This is a fallacy.

When the judgment was rendered, or immediately thereafter, Mrs. McWaters obtained an order for a devolutive appeal. She was not bound to give the bond immediately, in order to preserve her right to a devolutive appeal. A devolutive appeal may be taken at any time within twelve months, and this right is in no manner affected by any disposition the judgment creditor may choose to make of his judgment.

The judgment of the Supreme Court is only such judgment as the inferior court should have rendered, and it determines the rights of the parties as they stood at the time the suit was instituted.

If a sale should take place pending a devolutive appeal, and if taken

Elizabeth McWaters, Wife, et al. v. Arpha M. Smith, et al.

within twelve months, it is considered pending from the time the judgment was rendered, the judgment can not have effect upon the thing sold, but only on the proceeds—the plaintiff in execution will be liable to the successful appellant for the amount of the proceeds.

The plaintiff is entitled to a judgment against the defendant, Mrs. Smith, for \$15,055 51, the amount of the difference between the proceeds of the sale of her property pending the appeal and the amount of the final judgment obtained by Mrs. Smith.

It is useless to inquire whether this debt is secured by a vendor's privilege, as it would be without effect as to third parties for want of registry; and, therefore, this question may be laid out of view, until it is ascertained whether the sale of the property to Johnson by Mrs. Smith is valid.

This sale is now attacked on the grounds of simulation and fraud. An examination of the evidence satisfies us that there was neither simulation nor fraud.

It is proved that the \$10,000, acknowledged in the deed as cash paid, was really the amount, in part, of a debt due the wife of William W. Johnson by Mrs. Smith; and that the latter received, in lieu of the cash, the receipt of Mrs. Johnson for said amount. For the balance of the price, Johnson executed his notes for \$2500.

So far as concerned Mrs. Smith, this receipt of her creditor, tendered by Johnson, was equivalent to cash. It is just as valid as if Johnson had paid over to her in cash the \$10,000 and she had returned it to him in payment of her indebtedness to the wife of Johnson, which he had the right to collect. The sale to Johnson was virtually for \$10,000 cash and \$2500 on credit, evidenced by his notes; and the whole transaction was undoubtedly made in good faith by all parties. We conclude, therefore, that the sale was valid, and that plaintiff must fail in this part of her demand.

It is therefore ordered that the judgment of the court *a qua*, dismissing plaintiff's demand, be annulled; and it is now ordered that plaintiff, Mrs. McWaters, recover judgment against the defendant, Mrs. Smith, for fifteen thousand and fifty-five dollars and fifty-one cents, with legal interest thereon from the fifth January, 1867, and all costs.

It is further ordered that the revocatory demand against William W. Johnson be rejected, and there be judgment quieting his title.

Rehearing refused.

No. 810.

M. T. GORDY v. P. A. VEAZEY.

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Where plaintiff excepted to the ruling of the court *a qua* which permitted the defendant to establish by witnesses the value of certain items of the work sued on by plaintiff, on the ground that plaintiff having sued for the value of the work as a whole, without setting any specific value on its separate items, and the defendant having substantially accepted in his answer the issue presented, the testimony offered was not confined to said issue;

Held—That the exception was not well founded. The sum total of the bill sued on being composed of various items, it was competent for the defendant to show by witnesses the separate value of each of the items which made up the aggregate work in order that the correctness of the general charge might be properly arrived at.

A party for whom work has been done on a certain building is not barred from offering any proof of damage on account of the unskillfulness of the work because of his having taken possession of the building.

The testimony of a witness to establish that plaintiff had, before the instituting of his suit, presented to the defendant a bill in which he charged less for his work than the amount for which he has sued, was properly received.

APPEAL from the Third Judicial District Court, parish of Iberia. *Train, J. Caffery & Foster*, and *L. H. Montanye*, for plaintiff and appellant. *Joseph A. Breaux*, for defendant and appellee.

MORGAN, J. Plaintiff took his bill of exception to the ruling of the court which permitted the defendant to establish by witnesses the value of certain items of the work sued for by plaintiff on the ground that having sued for the value of the work as a whole, without setting any specific value on the separate items of the work, and the defendant having substantially accepted in his answer the issue presented, the testimony offered was not confined to the issue, but was calculated to take him (plaintiff) by surprise.

If the testimony offered could have the effect of taking plaintiff by surprise, this might have been a ground for applying for a continuance, but it was no ground upon which the reception of the testimony could be successfully objected to. The sum total of the bill sued on is composed of various items. It was competent for the defendant to show, by witnesses, the separate value of each of the items which made up the aggregate work in order that the correctness of the general charge might be properly arrived at. The testimony was, therefore, properly admitted.

The second exception to the ruling of the court is to the reception of testimony on behalf of the defendant to show damages which he claimed to have sustained on account of the unskillfulness of plaintiff's work. The objection was that the defendant was barred from offering any proof of damage after having taken possession of the building. We do not see why the defendant should be debarred from defending himself against what he considers an extravagant demand for repairs done to his property, simply because he took possession of it. He may have been unaware of the unskillful workmanship of his employe until after he had taken possession of his property. He may

Gordy v. Veazey.

have been, by necessity, forced to take possession of his property, whether the repairs were properly done or not. The evidence was properly received.

The third exception to the ruling of the court was to his admitting the testimony of a witness to establish that plaintiff had, before the institution of this suit, presented to the defendant a bill in which he charged less for his work than the amount for which he has sued. The ruling was correct. We do not see why a defendant who is sued for the value of work done on his property should not be enabled to show by the plaintiff what value he placed upon the work immediately after it was completed. Neither do we know any law or see any reason why a man who presents a bill for the value of work done should be allowed, because the bill is not paid, to sue for a larger sum than the amount originally claimed. There would be some authority for this in case the stipulation was that the work should be paid for the moment it was completed—the cash might be an inducement for a diminution of price, for he who pays later, pays less. But there seems to have been no stipulation in this regard between the parties to this suit.

The fourth exception is to the time when the judgment was signed. But this exception is not referred to in appellee's brief, and, we presume, as it has nothing to stand upon, that it is abandoned.

ON THE MERITS.

Plaintiff contracted to do certain work for the defendant for \$650. He also contracted to do certain other work for which he was to receive no stipulated price for which he charges \$1350, making his whole bill \$2000. He has received \$1159 25, and he sues for the balance, \$840 75.

The defense is that the work was not worth the sum charged, and that it was not done in a workmanlike manner.

The plaintiff and his witnesses (who were his journeymen) all swear that the work was done; that it was done in a workmanlike manner, and that it was worth the price charged.

The defendant and his witnesses swear that the work was not done in a workmanlike manner, and that it is not worth the sum charged. They say that the roof leaked and the work was not well done. Plaintiff says that the slates were not good, and that the lumber upon which they were placed, as well as the lumber used in other work done by him, was green and liable to shrink, and that the leak in the roof is attributable to the shrinkage and to the breakage of the slates caused by bricks and shells having been thrown upon them.

Defendant and his witnesses say the leak was caused by the unworkmanlike manner in which the slates were put on; and that most of the lumber was selected by plaintiff.

Gordy v. Veasey.

In short, as is usual in such cases, each party and his witnesses swear directly contrary to the other. Under such circumstances, it is impossible to do absolute justice between the parties. Both complain of the judgment of the district court, and both may, perhaps, suffer. But if they do, it is their own fault. Their troubles would not have been difficult to arrange had they made a contract for the whole of the work, as they did for a portion of it.

On the whole, we see no reason to distrust the judgment, in so far as relates to the value of the work. There is, however, error in the judgment, which neglects to give a privilege on the building upon which the work was done, and, in this regard, it must be amended.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be amended, and that the plaintiff be decreed to have a privilege upon the building upon which the repairs were made for the amount of the judgment rendered in plaintiff's favor; and that, thus amended, it be affirmed; appellees to pay the cost in both courts.

No. 814.

ELIAS LINDSTRUM v. ELIJAH EWING, Administrator.

Where in an action to annul a judgment obtained by defendant against the plaintiff on a promissory note, which judgment was affirmed on appeal to this court in 1869, it appears that the consideration of the note was the price of a slave purchased on the tenth of October, 1861, this is sufficient ground for setting aside the judgment which is sought to be annulled.

APPEAL from the Sixteenth Judicial District Court, parish of Vermilion, *Mcuton, J. M. E. Girard*, for plaintiff and appellee. *Breaux & King*, for defendant and appellant.

TALIAFERRO. J. This is an action to annul a judgment obtained by defendant against the plaintiff in a suit numbered 854 of the docket of the District Court, for the parish of Vermilion. This judgment was affirmed on appeal to this court, in September, 1869. See 21 An 683. The ground alleged for annulling the judgment is, that it was obtained and based upon a promissory note, signed by the plaintiff as surety of one Todd; the consideration of the note being the price of a slave purchased by Todd at the the probate sale of the succession of Alexander McDonald, in October, 1861. There was judgment in favor of the plaintiff, annulling the judgment in the suit numbered 854, *Elijah Ewing, administrator v. G. W. Rool et al.* The defendant appeals. The defendant filed several peremptory exceptions in bar of the plaintiff's right to recover. It will be necessary to consider only two of these—

“That the judgment sought to be annulled is *res judicata* and the action of nullity can not be maintained to avoid the same upon facts

Lindstrum v. Ewing, Administrator.

and allegations, which were known to plaintiff, and ought to have been pleaded before judgment."

"That if the judgment sought to be annulled had been obtained by fraud and ill-practices, as intimated in the plaintiff's petition, still, the action of nullity can not be maintained on that ground, because if any such fraud or ill-practice ever existed it was discovered more than one year prior to the institution of this suit, and the suit is barred by the prescription of one year."

The record shows that the judgment sought to be annulled was rendered in April, 1866, and before the nullity of contracts founded upon slave considerations had been declared by the courts of this State. That defense could not have been known to the plaintiff here when defendant in the action resulting in the judgment he now seeks to annul. The plaintiff bases his action mainly on the ground of the illegality of contracts, where the consideration was the price of slaves. The prescription of one year is not applicable. On the merits the plaintiff has fully made out his case. He shows clearly, as alleged in his petition, that he became a surety of Todd, on a note given by him for the price of a slave named Sarah, purchased by Todd, at the probate sale of the estate of Alexander McDonald, on the tenth of October, 1861. That he was sued upon that note, and that the judgment he now seeks to annul was rendered against him.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs. *Wainwright v. Bridges*, 19 An. 234, and many decisions subsequently rendered of the same purport.

No. 601.

HONORE DEJEAN, Tutor, v. JACQUES ARNAUD.

Judgment was rendered in this case on the fifteenth of January, 1861, decreeing that the defendant deliver up a slave to be sold in satisfaction of the plaintiff's claim, \$821, with interest, or in default thereof to pay the said sum and interest.

It is clear that there can be no recovery in this case, the plaintiff having set out by endeavoring to enforce a mortgage against a slave who has since become free. The parties called in warranty to make good the title to the slave are no longer bound.

A PPEAL from the Fifteenth Judicial District Court, parish of St. Landry. *Martel, J. Dupré & Garland*, for plaintiff and appellee. *Swayze & Moore, Lewis & Porter, E. Mouton*, for defendant.

TALIAFERRO, J. In April, 1859, the plaintiff in his capacity of tutor to the minor children of Eugene Bercier, deceased, instituted suit against the defendant to enforce the tacit mortgage derived to the minors from their mother, against a certain slave named Valsin, then owned by and in possession of the defendant. The defendant answered by general denial averring that he purchased the slave at a sheriff's

Honore Dejean, Tutor. v. Arnaud.

sale made on the seventh of August, 1852, at the suit of one Joseph Gradenego against Eugene Bercier, father of the minors, herein represented by the plaintiff. He alleged that the pretended judgment of separation of property between the father and mother of the minors, (according to the latter a tacit mortgage), in virtue of which the plaintiff was proceeding against him, was collusive and fraudulent. He prayed that Gradenego, the seizing creditor, and Louis Lastrappe, administrator of the estate of Eugene Bercier, deceased, the seized debtor, be called in warranty; and he subsequently called in Valery Meyer, alleging that he was bound in solido with Eugene Bercier in the judgment obtained against the latter by Gradenego.

The judgment rendered on the fifteenth of January, 1861, decreed that the defendant deliver up the slave to be sold in satisfaction of the plaintiff's claim (\$821) with interest, or in default thereof, to pay the said sum and interest. Judgment was also rendered over in favor of the defendant against his warrantors, Valery Meyer, and Lastroppe, administrator of the estate of Eugene Bercier. From this judgment Valery Meyer alone appealed. It is clear there can be no recovery in this case. The plaintiff set out by endeavoring to enforce a mortgage against a slave who has since become free. The parties called in warranty to make good the title to the slave are no longer bound.

It is therefore ordered that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

No. 804.

THE STATE OF LOUISIANA v. ANGELAS PRUDHOMME, et als.

It makes no difference whether an accomplice, who becomes a witness, has been convicted or not, or whether he be joined or not, in the same indictment with the prisoner to be tried, provided he be not put upon his trial at the same time.

The circumstance of the witness being an accomplice of the party on trial, affects his credibility only, of which the jury are to judge.

Under the laws of this State, all parties present, aiding and abetting in the commission of a felony, are principals therein. If the principle which prevents an accomplice to testify, be so restricted as to exclude all principals, it would have little practical importance.

A jury may convict on the uncorroborated testimony of an accomplice; they are the judges of his credibility. The rule requiring the judge to charge the jury that the testimony of an accomplice needs confirmation is rather a rule of practice than a rule of law.

A judgment decreeing imprisonment for life is not unauthorized by law, because the words "hard labor" are omitted in it. The words are not sacramental. They would add but little to the efficacy of the judgment.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J.* Criminal case. *G. W. Hudspeth*, District Attorney, appellee. *Perrodin, Wells, Lewis & Bro.*, for defendant and appellant.

LUDELING, C. J Cyriaque Guillory, Angelas Prudhomme and

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47	475
47	484
47	1598
25	522
49	1744
23	522
51	732
25	522
52	486
52	1920
25	522
e109	580

Louis Prudhomme were indicted for the murder of James McDaniel. Guillory was not arrested. The State asked for a severance, and put Angelas Prudhomme on his separate trial. He was convicted and sentenced; and he has appealed. An assignment of errors has been filed, which embodies, substantially, the questions presented for decision by the bills of exceptions reserved on the trial. They are the following:

First—That Louis Prudhomme, an accomplice, who was included in the same indictment, was permitted to testify against him before he had been tried and before a *nolle prosequi* had been entered in his case.

Second—That a letter, signed with his initials, was received in evidence before it was proved that it was written or signed by him, or by his request.

Third—That he was compelled to give evidence against himself on his trial.

Fourth—That the judge refused to charge the jury as requested.

Fifth—That his motion for a new trial was refused.

Sixth—That the sentence and judgment is not authorized by law.

I. It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried, or not, provided he be not put upon his trial at the same time. Roscoe 120; 2 Hawk. P. C., c. 46, sec. 90; 7 Ind. 326; 1 Greenl., sec. 379; 23 An. 78.

II. The letter was properly received in evidence. Louis Prudhomme testified that the accused had handed it to him, in jail, to be delivered to William Curley; that it was unsealed; that it had remained in his possession until the day of the trial, except when handed by him to Duson and others to read; and it was farther identified by Louis Prudhomme and Duson, the deputy sheriff, as a letter which he had been permitted, by Louis Prudhomme, to read. And at a later stage of the trial, L. Prudhomme testified that he had seen Angelas Prudhomme write the letter.

III. The tracks of the murderer were found near the scene of the murder, and to enable the witness who saw the tracks to state how they corresponded in size with the feet of the prisoner, he was forced to take his feet from under a chair where he had put them. This the prisoner's counsel calls forcing him to give evidence against himself. A mere statement of the facts shows how utterly untenable the objection is. The witness was required to look at the feet of the prisoner in order to testify to facts which might enable the jury to connect the prisoner with the perpetrator of the crime, and we are unable to perceive how any constitutional right of the prisoner was infringed by compelling him to place his feet where they could be seen by the witness and the jury.

The State of Louisiana v. Prudhomme, et als.

IV. The prisoner requested the court to charge the jury as follows: "That if the jury are satisfied that Louis Prudhomme, a witness for the State, is charged in the same indictment with the prisoner, Angelas Prudhomme, as a principal in the commission of the crime of murder therein charged; that he was expressly offered by the District Attorney to be sworn, and to testify on behalf of the State in this case, as an accomplice of the prisoner, Angelas Prudhomme, in the commission of the crime alleged in this case, and that said Louis Prudhomme was present, by previous combination and design, with any other person or persons, at the commission of the homicide charged in the indictment in this case, aiding and assisting in the commission of said homicide, he, the said Louis Prudhomme, was a principal in the offense charged; and that as an accomplice, and as a principal offender, if he is still under bond in said indictment, and neither tried nor discharged thereunder, the jury must reject his testimony entirely."

And further: "That where an accomplice testifies against an accused party in a criminal case, the accomplice who is such witness, must be corroborated as to the person of the accused; and if he is not so corroborated, the jury should acquit the prisoner; provided the testimony of the State tends to the conviction of the prisoner upon the evidence of such accomplice."

The judge *a quo* did not err in refusing the charges asked for.

We have already said that the accomplice was a competent witness for the State until he had been convicted and sentenced, if the party against whom the accomplice is offered as a witness be put upon his separate trial. The circumstance of the witness being an accomplice of the party on trial affects his credibility only, of which the jury are to judge. McNally's Ev. 200; 1 Greenl. 783.

Under the laws of this State all parties present aiding and abetting in the commission of a felony, are principals therein. If the principle, which permits an accomplice to testify, be so restricted as to exclude all principals, it would have little practical importance. We are of the opinion that an accomplice is not disqualified from testifying simply by being charged as a principal in the same indictment. The court did not err in refusing to charge the jury that Louis Prudhomme was, in the case stated, a principal offender—that is, a leader or instigator—and it is to such principal offenders that the authorities relied upon by the prisoner's counsel apply. 1 Greenl. § 379; 1 Phillips' Ev. 37.

The judge correctly charged that a jury may convict on the uncorroborated testimony of an accomplice; that they are the judges of his credibility, and that the rule requiring the judge to charge the jury that the testimony of an accomplice needs confirmation is rather a rule of practice, than a rule of law.

The State of Louisiana v. Prud'homme, et als.

“The rule requiring corroboration is a rule, not of law, but of general and useful practice, the application of which is for the discretion of the judge by whom the case is tried, and in its application, much depends on the nature of the offense, and the extent of the witness' complicity.” Fisher's Digest 563; 1 Phillips 113 (tenth edition, 1859); Roscoe 121: Whart. Crim. sixth edition, 1 vol. 785.

V. The motion for new trial was based on the hypothesis that the verdict was contrary to the law and the evidence. Having already decided that the rulings of the judge *a quo* were correct, it follows as a matter of course that we must hold that the new trial was correctly refused.

VI. The verdict of the jury was “guilty without capital punishment.” The judgment was that the convict be “imprisoned in the State Penitentiary for the space of his natural life,” etc. It is contended that because the words “hard labor” were omitted in the judgment, it is unauthorized by law. The words are not sacramental, and we imagine would add but little to the efficacy of the judgment.

Judgment affirmed.

No. 803.

STATE OF LOUISIANA v. LOUIS ALLEMAND, et als.

25	525
45	1044

25	525
117	490

An indictment charging that defendants received the property stolen with a felonious intent knowing the same to have been stolen at the time, is in sufficient conformity with the statute.

It is a rule of court, long since established, that unless personal service has been made upon a witness, no attachment to compel his attendance will be granted.

No postponement or continuance will be granted unless accompanied by proof of due diligence.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry. *Morgan, J.* Criminal case. *G. W. Hudspeth*, District Attorney, appellee. *B. A. Martel, F. Perrodin, G. H. Wells*, for defendants and appellants.

LUDELING, C. J. The defendants were convicted and sentenced for having feloniously received stolen goods, etc.; and they have appealed.

During the course of the trial they took bills of exceptions to the rulings of the judge; and in this court they have made the following assignment of errors, to wit: That the indictment does not charge them with the commission of any crime or offense known to the laws of the State; That the motion in arrest of judgment, based on the objection above stated, was improperly refused; that their motion for delay to procure the attendance of witnesses was incorrectly refused; that the sentence of judgment was erroneous, because it avers that defendants were

found guilty upon an indictment charging them with receiving stolen property, knowing the same to have been feloniously stolen, etc., whereas the indictment did not so charge, and it was absolutely necessary that said indictment should have so charged in order to sustain any conviction or sentence thereunder.

The first, second and fourth grounds of the assignment of errors are substantially the same—that the indictment was fatally defective in not stating that the defendants received the property feloniously taken or stolen. The charge in the indictment is, that defendants “unlawfully and feloniously did receive and buy a cow. of a red color,” etc.; “they, the said Charles Allemand, Louis Allemand, and Joseph Allemand, then and there, well knowing that the aforesaid cow had been taken, stolen, carried away and killed, contrary to the form of the statute,” etc. The object of an indictment is to advise the party accused of the charge against him, to enable him to prepare his defense, and to enable him to plead *autre fois* acquit or convict in any subsequent proceedings against him for the same offense.

In the second count of the indictment, under which they were convicted, they are charged with the crime of having feloniously received stolen property, knowing the same to have been stolen.

It is true, as contended for by defendant's counsel, that an indictment, under a statute, ought with certainty and precision to charge the defendant to have committed the acts under the circumstances and with the intention mentioned in the statute. This, we think, has been done in this case. It charges that defendants received the property, with a felonious intention, knowing the same to have been stolen at the time.

The ingredients of the crime, to wit: the act, the circumstances and intent constituting it, are stated; that is, the act of receiving the stolen property with a felonious intent, and with a knowledge that the same had been stolen. This, we deem, was all that was necessary. We do not think that any useful purpose could have been subserved by the use of the tautology contended for by defendant's counsel, in charging that the accused feloniously received property feloniously stolen, knowing it to have been feloniously stolen. Nor do we think the jurisprudence of this State requires it. See 24 An. 494.

The ruling of the court refusing an attachment for the witness Gomez, was correct. The judge *a quo* assigned the following reasons in the bill of exceptions: “That it was a rule of court long since established that unless personal service had been made upon a witness, no attachment to compel his attendance would be granted by the court; that the defendant, in common with all other parties against whom indictments had been found, or informations filed at previous terms of court, had been warned from the bench, and by proclama-

tion of the sheriff seven days previously, that their cases would be called for trial on the following Monday, and that no postponement or continuance would be granted, unless accompanied by proof of due diligence; that when such announcement was made, due diligence should have prompted them to have made examination as to whether their witnesses were properly summoned, and in default of their attendance, when summoned, to have caused attachments to issue returnable on the day indicated for trial, and to have had subpoenas issued for such as had not been properly summoned. Neither of which precautions was taken by defendants, and accordingly they had failed to exercise due diligence. And the judge *a quo* further assigned as reason for refusing the delay that the witness was a neighbor of the accused, and with ordinary diligence defendants could have had him present, and that, in his opinion, the application was for delay only. We think the reasons of the judge good. 1 Greenleaf, p. 451, §§ 315, 319.

Another bill of exceptions was taken to the refusal of the judge *a quo* to grant a temporary postponement of the trial of the case, or for *alias* (new) compulsory process against the witnesses Octave Gary and Nicholas Gary. The reasons of the judge *a quo*, stated in the bill of exceptions, are, because, at a preceding term of the court, holden in January, 1873, the defendants had, on their own motion, obtained a continuance, and had taken out compulsory process to compel the attendance of the witnesses named in this bill of exceptions; that said processes were made returnable on the first day of the next term of court, to wit: twenty-eighth April following; that the judge then warned the accused that they must use due diligence to have their witnesses present at the next term, and be ready for trial; that at the April term of the court, on the first Monday of the month, the judge *a quo* announced from the bench, and caused the announcement to be made by the sheriff that all causes in which indictments had been found, or information filed at preceding terms of the court, were fixed for trial on the following Monday, and that all such accused must be ready for trial, or show legal cause for a continuance; and on the day thus fixed for the trial, when the case was called for trial, the aforesaid application for a postponement of the case and for new process was made.

We agree with our learned brother of the District Court that the defendants had not used due diligence, and that the application should have been refused.

We have not been able to discover any error in the rulings of the District Court.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs of appeal.

No. 827.

JOHN I. ADAMS & Co. v. PANNELL SCOTT, et al.

A joint obligor can be cited at the domicile of his co-obligor.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *King, J. Lewis & Bro.*, for plaintiffs and appellants. *Henry L. Garland*, for defendants and appellees.

LUDELING, C. J. The defendants are ordinary partners, and were sued on an open account for supplies furnished to carry on their plantation. Pannell Scott, one of the defendants, excepted to the jurisdiction of the court on the ground that he did not reside in the parish.

As a joint obligor, he could be sued at the domicile of his co-obligor. "When the defendants are joint obligors, they may be cited at the domicile of any one of them." C. P., art. 165.

It is therefore ordered, that the judgment of the lower court be reversed; that the exception be overruled; and that the case be remanded to be proceeded with according to law. It is further ordered, that the appellees pay costs of appeal.

No. 826.

LOUISA ADELINE NEILSON v. WILLIAM H. NEILSON.

The defense that the note sued on was given in settlement of the claim of the plaintiff against defendant as tutor, when no account had been rendered by defendant to the court, can not be sustained.

The provision of the Code, which requires a tutor to render an account ten days previous to entering into any agreements with his ward, is intended for the protection of the ward, and he alone can take advantage of its disregard.

The tutor can not take advantage of his failure to comply with the law.

The allegation that the note was given for two slaves purchased at the tutor's sale of the minor's property, can not be listened to in a court of justice. The tutor can not, in his own defense, be permitted to urge his own dereliction of duty and violation of the laws of his country. Besides, it is in evidence that the price of the slaves was not the consideration of the note sued on.

The execution of the note for the amount ascertained to be due by the tutor did not change the character of the debt. It fixed the amount due and the period when it should be exigible, but it did not extinguish the legal mortgage which the law gave to secure the rights of the ward. Novation is never presumed.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Adolphe Bailey*, acting judge. *Moore & Morgan*, for plaintiff and appellee. *Lewis & Bro.*, for defendant and appellant.

LUDELING, C. J. This suit is based upon a promissory note for \$2540 70, with eight per cent. interest from the fourteenth of December, 1863, secured by a legal mortgage.

The defense is, that the note was given in settlement of the claim of the plaintiff against defendant as tutor, when no account had been rendered by defendant to the court; that the note was given for slaves; that the mortgage had been extinguished by novation.

 Louisa Adeline Neilson v. Neilson.

We will pass over the apparent contradiction of the defenses, and consider them separately.

First—The provision of the Code, which requires a tutor to render an account ten days previous to entering into any agreements with his ward, is intended for the protection of the ward, and he alone can take advantage of its disregard. C. C., art. 355. So that even if the execution of the note sued on, given for the balance due by him as shown by his account rendered to the ward, could be considered as coming within the terms of the article of the Civil Code, still the tutor could not take advantage of his failure to comply with the law.

Second—It is alleged that the tutor purchased the slaves at the tutor's sale of the minor's property. He can not be listened to, in a court of justice, when urging his own dereliction of duty and violation of the laws of his country. Besides, the proces verbal shows that James Dickey was the purchaser of the slaves, and the settlement between the tutor and the ward shows that defendant acknowledged he had received the price of the property sold. Whether the price of the slaves was paid by Dickey or himself, is immaterial to the plaintiff. Under either hypothesis, the price of the slaves was not the consideration of the note sued on.

Third—No agreement to novate the debt, due by the tutor, has been proved. The execution of the note for the amount ascertained to be due by him did not change the character of the debt; it fixed the amount due and the period when it should be exigible, but did not extinguish the legal mortgage, which the law gave to secure the rights of the ward. Novation is never presumed. C. C. 2190.

It is therefore ordered and adjudged that the judgment of the court *a qua* be affirmed, with costs of appeal.

Rehearing refused.

 No. 825.

ROBERT H. LITTELL et al. v. HENRIETTA WACKERHAGEN.

A vendor can not contest his own acts. On the contrary, he is bound to warrant their legality.

If the defendant in this case had title to the whole of the property she caused to be sold, her title was divested by the sale which she provoked, and the interest she acquired in it as one of the purchasers thereof is only the interest of a coproprietor. This interest is joint, and her right to the possession, use and enjoyment thereof is also joint, not exclusive.

A PPEAL from the Eighth Judicial District Court, parish of St. Landry
King, J. Bailey & Estillette, Henry L. Garland, for plaintiffs and
 appellees. *Lewis & Bro.*, for defendant and appellant.

MORGAN, J. In the suit of Henrietta Wackerhagen v. Augustus W. Littell et als. Robert H. Littell, Joseph Block and Henrietta Wacker-

 Little et al. v. Henrietta Wackerhagen.

hagen purchased certain lands, mules, and other property, belonging to the defendants in execution. The purchase was made in the interest of one undivided third to each of the purchasers.

Subsequent to the sale, Mrs. Wackerhagen got possession of the mules, carts, etc., which were sold under the execution issued in the case above mentioned, and proposed to remove them. She has been enjoined.

Answering the petition of injunction, she sets up title in herself to the property of which she claims to be the owner, under title from her son, which she alleges she acquired from him, anterior to the sheriff's sale. But, it seems to us, she forgets that the property was sold under execution issued by herself, and that she not only stood by and saw the property, which she now claims as her own, sold, but that she caused the sale thereof. In this sense she is a vendor, and can not contest her own acts. On the contrary, she is bound to warrant their legality. If she had title to the whole of the property sold, her title was divested by the sale which she provoked, and her interest in it now, she being one of the purchasers thereof, is only the interest of a coproprietor. This interest is joint, and her right to the possession, use and enjoyment thereof is also joint, not exclusive. Therefore, the judgment perpetuating the injunction which prohibits her from removing it from the property to which it was affixed by destination, and exercising absolute control over, and possession of it, is correct.

Judgment affirmed.

 No. 812.

L. GREVENBERG v. D. BOREL.

It is not proving title to lands by parol, when the sole object of the testimony is to prove where wood was cut, whether on the plaintiff's or defendant's lands, and such testimony should have been received in this case.

The verdict and judgment in favor of defendant is erroneous. The plaintiff having failed to make out his suit, the evidence only justified a non-suit.

A PPEAL from the Third Judicial District Court, parish of Iberia. *Train, J.* Jury trial. *J. A. Breaux*, for plaintiff and appellant. *Perry & Delahoussaye*, for defendant and appellee.

LUDELING, C. J. This is a suit for damages resulting from an alleged trespass upon the lands of the plaintiff. There was a verdict of the jury and judgment in favor of the defendant, and the plaintiff has appealed.

Several bills of exceptions were taken on the trial; but the view we have taken of this case renders it necessary to notice only one of them, to wit: that taken to the ruling of the judge rejecting a part of the testimony of Druilhet, taken by commission, in another suit, but which the parties to this suit agreed might be used as if taken in this case, subject to all legal objections to the substance of the evidence.

L. Grevenberg v. D. Borel.

The reason for rejecting the testimony was, that the word "defendant," in the testimony, referred to the defendant in the suit in which the testimony was taken. Conceding this to be true, that was no reason for rejecting the testimony.

The further reason, that it was proving title to lands by parol, was also erroneous.

The sole object of the testimony was to prove where the wood was cut, whether on the plaintiff's or defendant's lands, and it should have been received.

The verdict and judgment, in favor of the defendant, are clearly erroneous; for, if the plaintiff failed to make out his case, the evidence only justified a judgment of non-suit.

But the testimony of Druilhet is to the effect that forty cords of wood were cut by defendant on plaintiff's lands; and if the evidence had been before the jury, it is probable the verdict would have been different.

We think, however, that the ends of justice will be subserved by remanding the case to be tried *de novo*. We deem it proper to state that the only questions to be decided in this case are: whether or not the wood was cut upon the plaintiff's lands? and what was the value of the wood before it was cut?

It is, therefore, ordered and adjudged that the judgment of the lower court be reversed; that the verdict of the jury be set aside; and that the case be remanded to be tried in conformity to the views above expressed. It is further ordered, that the appellee pay costs of this appeal.

No. 806.

CLARA MIGUEZ et al. v. DELAHOUSSEY et al.

A judgment ordering the sale of succession property to pay an unliquidated claim against the heirs, is a mere nullity.

A judgment ordering the partition of succession property is invalid when one of the heirs has not been a party to the suit.

25	531
105	480

A PPEAL from the Parish Court, parish of St. Martin. *Fournet J. J. A. Breaux*, for plaintiffs and appellees. *De Blanc & Fournet*, for defendants and appellants.

WYLY, J. On twenty-sixth September, 1871, Francisco Segura obtained judgment against the heirs of his wife ordering a partition of the community property, and ordering a sufficient amount thereof to be sold to pay a claim of \$5000 set up by him.

On eleventh December, 1871, an order was issued to sell certain property to satisfy said claim of \$5000.

The plaintiff opposed the sale, and enjoined the auctioneer from

Clara Miguez et al. v. Delahoussaye et al.

making it, on the grounds that the court was without jurisdiction *ratione materiæ*, and that this claim of \$5000 was unliquidated, was not established by a judgment, and, therefore, the court could not legally order the sale of succession property to pay it. The petition also alleges that Ulger David, one of the heirs, was not a party to said judgments.

The prayer of the petitioners is that said judgments be annulled, and the injunction be perpetuated. And from the judgment in favor of the plaintiffs the defendant Francisco Segura has appealed.

We think the court did not err. The judgment ordering the sale of the property to pay the unliquidated claim of Francisco Segura was a mere nullity.

The judgment ordering the partition was invalid, because one of the heirs, the petitioner, Ulger David, was not a party to the proceeding.

Whether the plaintiffs, who are heirs, have given a sufficient bond and made the necessary affidavit to authorize the injunction which they obtained, is immaterial.

The conservatory order of injunction may have issued improperly, but this can not defeat the action of nullity and third opposition now before the court on its merits.

It is therefore ordered that the judgment herein be affirmed, with costs.

No. —.

STATE OF LOUISIANA v. HENRY L. GARLAND.

To use abusive language towards a member of the court and commit an assault upon his person during a recess, and in the court room, under the pretext of resenting what he had said or done when on the bench, is a contempt of court.

An answer by the defendant to the rule to show cause why he should not be punished, which is substantially a justification of his act, must be regarded as an aggravation of the contempt.

ON the trial of this rule for contempt of court, *G. W. Hudspeth*, District Attorney for the Eighth Judicial District, appeared for the State, and *H. L. Garland*, for himself.

TALIAFERRO, J. The District Attorney of the Third Judicial District took a rule against the defendant to show cause why he should not be punished for a contempt of court charged to have been committed by him on the thirteenth of June, 1873, in the following manner: That immediately after vacating the bench for a recess (the court not having adjourned) the defendant approached John T. Ludeling, the Chief Justice, using towards him abusive and vituperative language, and at the same time made a violent assault upon his person. To the rule the defendant filed the following answer:

To the Honorable Judges of the Supreme Court of Louisiana, holding sessions at Opelousas:

In answer to the rule taken upon me to show cause why I should not be punished for contempt of your honorable court, I respectfully aver that, by the words spoken to and acts done towards the Hon. John T. Ludeling, during the recess of your session on yesterday, I intended no disrespect of, or contempt for, the tribunal over which you preside.

That the words spoken to and my conduct towards him were not said and done directly in the presence or hearing of the court during the sitting of the same, and can not, therefore, be construed or taken to be a contempt of your honorable court.

After thus meeting the issue tendered to me by your honorable court, I beg leave to state that in rising on yesterday morning from my seat, when Judge Ludeling was reading the decision in the case No. —, entitled John I. Adams & Co. v. Pannell Scott et al., my intention was only to call the attention of the court to the fact that the case had been submitted on briefs to be filed on that morning, that I had filed my briefs within the time granted, and that as they were upon the clerk's desk and had not been taken by him to your honors, the decision was being rendered without giving me a hearing.

I further beg leave to state that, in thus rising from my seat to give opportunity to the court to recall the circumstances of the case, I was acting only for the interest of my client, and not with any intention to violate the rule (unknown to the bar of this district) that the court could not be interrupted in any manner or for any cause while reading its decisions.

And I further beg leave to state that upon this occasion I was rudely and harshly treated by Judge Ludeling.

That I considered his conduct towards me in the light of a personal injury, and as such resented it, without intending any contempt of your honorable court. Respectfully submitted,

HENRY L. GARLAND.

The facts of the case are that, on the morning of the day set forth in the rule, while the Chief Justice was reading an opinion of the court, the defendant, who is an attorney-at-law, rose and said he desired to call the attention of the court to a decision which had just been rendered. The Chief Justice said to him that he must not interrupt the court while opinions were being read. Garland continued to address the court, when the Chief Justice directed him to take his seat. He did so, but rose again soon after and addressed the court, whereupon the Chief Justice ordered a fine of ten dollars to be imposed upon him for a contempt of court. A short time after the court took a recess. No adjournment was made. The judges descended from the bench. While the Chief Justice was standing in the court room, having been

State of Louisiana v. Garland.

stopped on his way to the door by a member of the bar, Garland approached him, while all the members of the court were in the room, and, after a short conversation regarding the conduct of the Chief Justice toward him, and in the presence of one at least of the members of the court, the other members of the court having left the room, and in the presence of the officers of the court, many members of the bar and a number of citizens, used abusive language toward and committed a violent assault upon him.

The answer being substantially a justification of the act, we regard it as an aggravation of the contempt.

It is therefore ordered that a fine of one hundred dollars be and the same is hereby imposed upon the said Henry L. Garland, and that he be imprisoned twenty-four hours in the public jail of the parish and pay the costs of these proceedings.

No. 817.

SUCCESSION OF ANTOINE ROMERO. Opposition of S. ROMERO et als.

Where the administrator and the opponent to the tableau of distribution by said administrator have filed a written agreement to have the judgment dismissing the opposition reversed, and to reinstate the opposition, and to remand the case to be tried on its merits; Held—That this can not be done without the consent of all the parties interested, several of whom are not before the court, and that the case must be continued to have the creditors on the tableau cited according to law.

A PPEAL from the Parish Court of the parish of St. Martin. *Handy, J. E. Simon*, for opponent and appellant. *DeBlanc* and *Perry*, administrator and appellee.

LUDELING, C. J. The administrator of the estate filed an account and tableau of distribution, to which several oppositions were filed. On the day fixed for the trial, the opponents failed to be present, and their oppositions were dismissed on motion of the administrator.

S. Romero then applied for a devolutive appeal, by petition. The creditors on the tableau were not cited, and one of them has moved to dismiss the appeal for want of citation. The fault in not citing the creditors is not attributable to the appellant, but to the clerk; it is not a cause for dismissing the appeal.

The administrator and the appellant have filed a written agreement to have the judgment dismissing S. Romero's opposition reversed, to reinstate the opposition, and to remand the case to be tried on the merits. This we can not do without the consent of all the parties interested—several of whom are not now before this court.

It is therefore ordered that the case be continued to have the creditors on the tableau cited according to law.

Rehearing refused.

25 534
e112 860

Lindstrum v. Ewing, Administrator.

No. 809.

SUCCESSION OF ALEXANDER MELANÇON. Opposition of EULALIE LATIOLAIS.

Where a widow, in necessitous circumstances, opposes the administrator's account of a deceased husband's estate, claiming that she is entitled to one thousand dollars under the homestead act, and it appears that the children own more than one thousand dollars in their own right, the widow does not come within the provisions of the statute.

A PPEAL from the Parish Court of the parish of St. Martin. *Fournet, J. F. Voorhies* and *E. Simon*, for opponent and appellee. *Z. F. Fournet*, for the administrator and appellant.

LUDELING, C. J. Alexander Melançon was twice married. By his first marriage he had six children; by his second he did not have any children. The estate of the father is indebted to the children in the sum of \$2751 55, and there are funds in the hands of the administrator to pay the debts.

The widow is in necessitous circumstances, and she opposed the administrator's account, claiming that she is entitled to one thousand dollars under the homestead act.

The statute provides that "a sum, which, added to the amount of property owned by them (the widow and children), or either of them, in their own right, will make up the sum of one thousand dollars," shall be given to the widow and children.

As the children own more than one thousand dollars in their own right, the widow does not come within the provisions of the statute. *Stewart v. Stewart*, 13 An. 398; 15 An. 527.

It is therefore ordered that the judgment of the lower court be reversed, and that the opposition to the account be dismissed with costs in both courts.

WYLY, J. I concur only on the authority of *Stewart v. Stewart*, 13 An. 398.

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
M O N R O E .

JULY, 1873.

JUDGES OF THE COURT :

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	}	<i>Associate Justices.</i>
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. P. H. MORGAN.		

No. 378.

THE STATE OF LOUISIANA *v.* ANDERSON JACKSON and others.

Where a motion for a new trial and one in arrest of judgment were predicated upon the hypothesis that only forty-six jurors were drawn on the panel :

Held—That inasmuch as no objection was made to the jury until after conviction, the refusal of the judge *a quo* to grant a new trial or to arrest the judgment was correct, even if the facts were as supposed. One can not take the chances of a verdict in his favor, and after conviction object to the jury.

APPEAL from the Fourteenth Judicial District Court, parish of Ouchita. *Ray, J. W. W. Farmer*, District Attorney, for the State, appellee. *J. F. Strother* and *R. J. Caldwell*, for defendants and appellants.

LUDELING, C. J. The defendant, Anderson Jackson, having been convicted and sentenced “for setting at liberty, by force and without due authority, a person in custody for an offense not capital,” has appealed, after having unsuccessfully attempted to obtain a new trial and to arrest the judgment.

Both motions are predicated upon the hypothesis that only forty-six jurors were drawn on the panel. This is a question of fact. No bill of exceptions having been taken to the ruling of the judge, this court has not the power to examine the question of fact. Art. 74 of Constitution.

But, inasmuch as no objection was made to the jury until after conviction, the refusal of the judge *a quo* to grant a new trial or to arrest the judgment was correct, even if the facts were as supposed. One can not take the chances of a verdict in his favor, and after conviction object to the jury 7 An. 284; 8 An. 515.

It is therefore ordered that the judgment of the District Court be affirmed, with costs of appeal.

No. 314.

THOMAS NAUGHTON v. B. H. DINKGRAVE et als.

An order of seizure and sale should not be enjoined for insufficiency of the evidence upon which it was rendered. The remedy is an appeal. This is undoubtedly so, where a judgment is sought to be revised on that ground.

In this case a devolutive, instead of a suspensive, appeal was taken, and, while the court below had lost jurisdiction of the case by reason of the appeal, the appellant obtained an injunction to restrain the execution of the judgment on the ground of the insufficiency of the proof on which the order of seizure and sale had been rendered.

Whether, or not, the evidence was sufficient, was a question for this court to decide in revising the appeal from the order of seizure and sale, and which the district judge had no right to determine in an injunction proceeding.

The plaintiff had no right to use the remedy of injunction in connection with his devolutive appeal, for the purpose of gaining the advantage of a suspensive appeal. There is neither law nor precedent for it.

A district judge can not revise his decrees, by an injunction, on the ground of the insufficiency of proof. A new trial and an action of nullity are the only modes by which he can revise his judgments.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Stubbs & Cobb*, for plaintiff and appellant. *Morrison & Farmer*, for defendant and appellee.

WYLY, J. An order of seizure and sale should not be enjoined, as in this case, for insufficiency of the evidence upon which it was rendered. The remedy is an appeal. This is undoubtedly so where a judgment is sought to be revised on that ground. No one will contend that insufficiency of proof is a good ground to enjoin a judgment. Why should it be in regard to an order of seizure and sale? The law has not so provided.

Where a judgment has been rendered by default, the defendant has ten days after service of the notice of judgment to take a suspensive appeal, and twelve months for a devolutive one. Where an order of seizure and sale has been rendered the defendant has likewise ten days after service of the notice thereof to take a suspensive appeal, and twelve months for a devolutive one.

Why should there be some remedy in the latter case that there is not in the former?

We see no necessity for it. In both cases the parties whose interests are affected have ample time to take either a suspensive or devolutive

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appeal. If they desire the writ of execution arrested pending the appeal, they can have it by giving suitable bond, and such security as the law requires.

Why should the same judge who decided the evidence sufficient, and issued the fiat, grant an injunction and restrain it on the ground that the evidence that he had just pronounced sufficient, is insufficient?

In the case before us, the plaintiff chose to take a devolutive appeal, although he had ample time to take a suspensive one. While he was appellant, and after the court below had lost jurisdiction of the case by reason of the appeal, he obtained this injunction to restrain the execution of the judgment on the same ground, to wit: the insufficiency of the proof upon which the order of seizure and sale was rendered.

Whether or not the evidence was sufficient was a question for this court to decide in revising the appeal from the order of seizure and sale. It was a question, which, in our opinion, the District Judge had not right to determine in an injunction proceeding. The plaintiff had no right to use the remedy of injunction in connection with his devolutive appeal for the purpose of gaining the advantage of a suspensive appeal.

To get a suspensive appeal the law requires a bond exceeding by one-half the amount of the debt. In coupling an injunction with a devolutive appeal the plaintiff only gave bond for damages, which can not exceed one-fourth the amount of the debt. Thus, by this extraordinary procedure, the plaintiff has succeeded in appealing from the order, and suspending its execution in the meantime, he has gained practically all the advantages of a suspensive appeal, and has incurred only one-fourth the responsibility thereof. Such a practice should not be sanctioned by the court; there is neither law nor precedent for it. If the appellant desires execution suspended, he must take a suspensive appeal, as the law requires. He can not accomplish the object by combining an injunction with a devolutive appeal. The District Judge can not revise his decrees by an injunction on the ground of the insufficiency of proof. A new trial and an action of nullity are the only modes by which he can revise his judgments. This court may do so by appeal.

For the reasons stated, it is therefore ordered that the judgment herein be affirmed with costs.

TALIAFERRO, J., concurring. The plaintiff in this case sued out an injunction to restrain the sheriff from selling, under two orders of seizure and sale, certain property in Monroe belonging to the plaintiff. The ground set up for obtaining this injunction is, that the orders of

seizure and sale were rendered upon insufficient evidence; having been granted without authentic proof of the transfer, by endorsement of the payee, of the notes secured by the mortgage which the defendant was seeking to enforce. A motion was filed to dissolve the injunction on several grounds, to wit:

First—That the affidavit does not state the facts, which, according to his belief, render an injunction necessary to protect his rights; nor does the affiant swear that the facts stated in his petition render an injunction necessary.

Second—That the bonds given are not made payable to the defendant, as prescribed by law, but are made payable to the clerk.

Third—That the only ground for injunction set out in the petition is, that the evidence on which the orders of seizure and sale were granted is insufficient—which can not be ground for injunction, but is matter on which to base an appeal, and the plaintiff has taken devolutive appeals from the orders of seizure and sale, which he has, since the date of his said appeals, herein enjoined.

Fourth—That the ground of injunction, just stated, is set up in the appeals to the Supreme Court from the aforesaid orders of seizure and sale, and, being thus *lis pendens*, can not be set up again in this injunction.

The motion to dissolve was sustained by the court below, and the injunction was dissolved at plaintiff's costs—the court rendering judgment *in solido* against the plaintiff and his sureties, in favor of the defendant for the sum of six hundred and eighty dollars, one-half thereof as special damages, and the other half as general damages on the amounts enjoined. From this judgment the plaintiff has appealed.

The appellee prays that the judgment be amended by granting him twenty per cent. as general damages on the amount enjoined, and that, in other respects, the judgment be affirmed.

The ground set up for obtaining the injunction is precisely the same as that on which the appeals were taken. The question arises, was it necessary to the preservation of his rights, or his protection against a wrong, that the plaintiff should resort to the equitable remedy of injunction? He took a devolutive appeal from the order directing the seizure and sale of his property. There is no reason shown why he did not take a suspensive appeal. He was entitled to either a devolutive or a suspensive appeal. But it is argued that the plaintiff has the right to use any or all the remedies conceded by law to a person for the protection of his rights; that in this case he could take a devolutive, instead of a suspensive appeal, if he thought proper; and if the defendant proceeded to execute the order, he might resort to an injunction to suspend the sale until the matter in controversy should be determined on appeal.

In reasoning upon this question, I look to the rights of all the parties concerned. The creditor, seeking to enforce his claims against his debtor, has rights as well as the debtor. The creditor has the right to have payment of his debts enforced without unreasonable delay. If the debtor has several remedies of defense, it does not follow that he is, in every case, compelled by necessity to resort to them all. If, in a given case, the use of one remedy is amply sufficient to secure the rights of a party, is there reason or equity in permitting him to involve his adversary in needless expense and trouble by using all his remedies? It would be no denial of the right of injunction to say that its exercise has proper limits.

Whilst, therefore, I concede that cases might arise in which a litigant would be justifiable in resorting to injunction in cases like the present, yet I hold that the resort to it should in cases of questionable right be restricted to instances where it is clearly shown that circumstances rendered it necessary. But it may be said that the sale of the plaintiff's property, under an illegal order, would be a wrong which the law provides him with a remedy to avoid. The law also provides him with the remedy by suspensive appeal to effect the same purpose. That there was any impediment in the way of his exercising that right, I am not authorized to infer from anything in the record.

Without assenting to the reasons given in the opinion of the majority of the court, I concur in the conclusion that the judgment of the lower court should be affirmed.

We think the judgment of the lower court correct. The ground set up for obtaining the injunction is precisely the same as that on which the appeals were taken. All the relief he could obtain by the injunction proceeding was obtainable by appeal. By taking a suspensive, in place of a devolutive appeal, he might have obviated the sale until the appeal was decided. The law discountenances a multiplicity of suits. The case is clearly one of *lis pendens*. The matter of controversy was the same and before the same tribunal—between the same parties and for the same cause of action. Code of Practice, article 335; 1 An. 46; 4 An. 520; 21 An. 639.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

LUDELING, C. J., *dissenting*. This is an injunction to prohibit the sheriff from proceeding with the execution of two writs of seizure and sale obtained by Henry Burns against Thomas Naughton.

The ground of injunction is substantially that the note for the debt secured by the mortgage is in favor of J. Frank Pargoud, and it is indorsed by him in blank, *sous seing privé*, and not by authentic act,

and that the order of the judge under which the writs were issued was unauthorized by law and null and void.

A motion was filed to dissolve the injunction, for four reasons :

First—Because the affidavit is defective.

Second—Because the bond is defective.

Third—Because of *lis pendens*, an appeal from the order having been taken to this court.

Fourth—Because the only ground for injunction alleged is, that the evidence on which the orders of seizure and sale were granted is insufficient, “ which can not be ground for injunction, but is a matter on which to base an appeal, and the plaintiff has taken a devolutive appeal before suing out this injunction.”

The first two grounds in the motion are not good, if, notwithstanding the defective bond and affidavit, it appears that the plaintiff would be entitled to a new injunction.

The plea of *lis pendens* is also unfounded. C. P. 335. In order that the plea should be good, it should appear that the suit is between the same parties for the same object, growing out of the same cause of action, and before another court of concurrent jurisdiction. If it be true, as contended for by the defendant, that the suit in this court involves the same issues and between the same parties as those in this case, it would seem to be an additional reason to authorize the injunction.

In *Johnston v. Hickey* this court said: “ In this case the plaintiff obtained an injunction against an order of seizure and sale, which was about to issue against his property at the instance of the defendant. The petition for the injunction has reference to a suit pending between these parties in relation to part of the same contract on which the order of seizure is claimed in the present case, and reference is made to the answer in that suit to ascertain some of the facts relied on to obtain the injunction in the present, etc. * * * For the purpose of deciding on a motion to dissolve an injunction, the facts alleged in the petition on which it is obtained are taken as true, but afterwards may be controverted in an answer on the merits, if such motion does not prevail. We are of opinion that the facts in the present case ought to have been considered by the court below as sufficient to sustain the injunction until the cause could be heard and determined on its merits.” 4 La. 285. In that case it had been urged that “ no injunction can issue to restrain executory process, unless for one of the reasons assigned in C. P., Arts. 738, 739.” But this court thought otherwise then.

And this brings me to the consideration of the last, and, as it seems, the chief reason for refusing the injunction, to wit: that having taken a devolutive appeal from the order of seizure, the want of authentic evidence to authorize the *fiat* is no ground for an injunction.

It has been argued that the question presented by the allegations of the petition for injunction is, whether or not the insufficiency of evidence to authorize a judgment can be made a cause for an injunction. In my judgment that is not the question. The question is one of power or authority in the judge to act at all. The judge has no authority to grant an order for executory process on any other than authentic evidence. 7 M. 239, *Day v. Fristoe*; 1 An. 323; 4 An. 152; 5 An. 124, *Yates v. Phipps*; 10 M. 223; 3 N. S. 315; 7 N. S. 515; 12 R. 238; 2 An. 491; 1 R. 407. If, therefore, he act without authority, his act is a nullity, from which no civil effects or rights can arise. "When the creditor is in possession of such an act, he may proceed against the debtor or his heirs, by causing the property subject to the privilege or mortgage to be seized and sold on a simple petition, and without previous citation of the debtor," etc. C. P. 734.

The decree ordering a seizure and sale is so far a judgment that an appeal will lie from it; but it is not a judgment in the true legal sense of the term, and possesses none of its features. It issues without citation; it decides on no issue; nor does it adjudicate to the party obtaining it any right in addition to those secured in his notarial act. 16 La. 254; 3 An. 253. If the judge had inadvertently granted an order of seizure and sale on an act under private signature, or a judgment in chambers on an ordinary confession of judgment, I imagine no one would affirm that such an order or judgment was not an utter nullity. In my judgment the case at bar is not materially different.

The rule that an injunction will not be granted to arrest a *fi. fa.* for causes existing anterior to the judgment does not apply to orders of seizure and sale, and this has been recognized by this court in numerous cases. In *Chambliss v. Atchison*, 2 An., an order of seizure and sale was enjoined, and a motion was made to dissolve the injunction. This court said: "Among the specific grounds relied on in argument by the counsel for Atchison, in support of the judgment appealed from, so far as it perpetuates the injunction, the following are deemed material:

"*First*—Chambliss could not legally obtain an order of seizure on the outstanding notes of Niebert, the stipulation of the defendant to pay those notes only conferring upon him an equitable action to enforce payment.

"*Second*—The power of attorney to Lacoste, which is one of the documents on which the order of seizure issued, is a private statute. Act 8.

"*Third*—The certificates and affidavit of the justice to prove demand from the original debtor are private acts, not under seal as required by the statute of Mississippi.

"*Fourth*—The copies of the statutes of Mississippi, adduced to show

the capacity of justices of the peace to act as notaries and to prove the rate of interest on the notes, are not authentic in the meaning of Arts. 732 and 733 of the Code of Practice.

"Fifth—The identity of the notes is not shown. They were not paraphed by the notary. The mortgage to Niebert describes those that were given as drawn in favor of Bass, and his name is not on those which the plaintiff has produced."

The facts assumed in these grounds are apparent on the face of the record, and force upon us the conclusion that the order was granted upon evidence not authentic.

It is contended that none of those grounds but the first were set forth in the petition praying for the injunction, and that the others can not be noticed here. The authorities relied upon in support of that position do not, in our opinion, establish it. "When executory process is prayed for on an act said to import a confession of judgment, the judge must examine and decide whether the instrument unites all the requisites of the law necessary to authorize this summary proceeding; so far it is a judgment, and an appeal lies from it, as from all other orders of court that might work an irreparable injury." And the court perpetuated the injunction. 2 An. 491; 3 An. 150; 10 R. 70.

Did the fact that Naughton had taken a devolutive appeal deprive him of the right to enjoin the sale attempted to be made under an illegal order? I am aware of no law which would deprive him of this right, and I can imagine no good reason for it. It is said he might have suspended the effect of the order by taking a suspensive appeal. Supposing he could not take a suspensive appeal, for the want of a security willing to sign such a bond—an hypothesis by no means improbable—is this court to deprive him of another remedy afforded him by law to protect his property from an illegal seizure and sale? I think not.

But the law gave him the right to take a suspensive or devolutive appeal. He chose the latter—no doubt believing that it was enough to call the attention of the parties to the fatal defect in their proceedings to stop it. But the defendant chose to try to enforce his illegal order, notwithstanding the appeal, and I am at a loss to imagine why the plaintiff should not be permitted to avert the wrong attempted to be inflicted upon him by enjoining the illegal writs.

This court decided recently on the appeal taken from the order of seizure, under which the writs enjoined in this case issued, that the order of seizure and sale was wrongfully issued; that the ground of plaintiff's injunction was good, and yet he is mulct in twenty per cent. damages for seeking to avert a wrong—for trying to prevent trespass upon his property.

For the foregoing reasons I dissent from the opinion of the court.

ON REHEARING.

TALIAFERRO, J. A rehearing was granted in this case only on the subject of damages. A review of the case in regard to that question induces us to think that general damages alone should be allowed.

It is accordingly now ordered that the judgment of the lower court, so far as it condemns the plaintiff in injunction and his sureties *in solido* to pay the defendant three hundred and forty dollars as special damages, be annulled and set aside; and that in all other respects the judgment be affirmed, the defendant in injunction paying costs of this appeal.

The Chief Justice adhering to the views expressed in his dissenting opinion in this case.

No. 410.

C. H. MORRISON v. A. F. FLOURNOY & Co.

Where the debt and contract on which a judgment was obtained existed prior to the Constitution of 1868, article 132 of that instrument is not applicable, and, therefore, the judgment does not fall within the provisions of the act No. 40, approved February 24, 1869.

Article 132 of the Constitution is not self-acting, and can only have effect in the manner provided by statute.

When there was no law authorizing the Sheriff to advertise and sell, as he did, the cotton plantation of the plaintiff under the judgment of the defendants, in lots of from ten to fifty acres, disregarding the plaintiff's notice that he desired it sold in block and not according to the advertisement; and where, in defense of his act, the Sheriff contended that, before the day of sale, he had notified the plaintiff to inform him whether he desired the property thus advertised to be sold in lots or in block, and that plaintiff, having refused to give any instructions, had no cause to complain;

Held—That in forced sales the forms of law must be strictly complied with, and that, in this case, the defect in the Sheriff's proceedings could not be cured in the manner attempted by him.

Property advertised to be sold in lots of from ten to fifty acres could not be legally sold in block, and the plaintiff, at this stage of the proceedings, was not bound to give any directions to the Sheriff, or to give any consent as to the manner of selling his property.

He had the right to require a legal advertisement, and was not bound to waive it by giving instructions to the Sheriff concerning the sale.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellee. *R. G. Cobb*, for defendants and appellants.

WYLY, J. This case is correctly stated by the counsel of the plaintiff, and is as follows:

The defendant held a judgment against the plaintiff; sued out a *fieri facias*, and seized a cotton plantation belonging to plaintiff in injunction.

The Sheriff advertised the property for sale, to be sold in lots of not less than ten nor more than fifty acres.

This sale was enjoined on the ground, among others, that the defend-

ant in execution had notified the Sheriff that he wished the property sold in block; that the (contract) debt on which the judgment was obtained existed previous to the adoption of the Constitution of 1868. Article 132 did not for that reason apply.

After the injunction had been issued and served, and while it was pending, the plaintiff in execution returned the *fi. fa.*, and sued out an *alias writ*.

On this second execution the sheriff relieved upon the same property. As soon as this last seizure was made, defendant in execution served a notice on the Sheriff that he desired the property sold in block.

Notwithstanding this notice, the former injunction, and the law, the Sheriff proceeded to advertise the property for sale again, to be sold in lots, as in the first instance.

The defendant in execution then sued out the present injunction, averring that it was illegal, irregular, and harassing for defendants in injunction to return the first execution, and to proceed in the execution of the second in the manner they had been restrained from doing under the first, until the issues made by the injunction then pending had been disposed of;

That it was the wish of defendant in execution to have his property sold, if at all, in block; that it had on it a standing crop, and to sell it in lots would be greatly to the damage of petitioner;

That the law authorized him to have it sold in block; the debt and contract on which the judgment was obtained existed prior to the Constitution of 1868; therefore article 132 was not applicable.

Defendants answered by admitting the seizure and advertisement of the property to be sold in lots, as alleged, but averred the correctness and legality of the proceedings.

The court perpetuated the injunction, and defendants have appealed.

The contract on which the judgment was based existed before the constitution of 1868. Therefore this judgment does not fall within the provisions of the act No. 40, approved February 24, 1869.

In *Bowie v. Lott*, 24 An. 214, this court held that article 132 of the constitution, which provides that "all lands sold in pursuance of decrees of courts shall be divided in tracts of from ten to fifty acres," is not self-acting, and can only have effect in the manner and to the effect provided by statute. There are other decisions to the same effect.

There was, therefore, no law authorizing the sheriff to advertise and sell the cotton plantation of the plaintiff under the judgment of the defendants in lots of from ten to fifty acres, the plaintiff having notified him that he desired it sold in block.

But the defendants contend, that before the day of sale the sheriff notified the plaintiff to inform him whether he desired the property sold in lots or in block, and the plaintiff having refused to give any instructions, has no cause to complain.

In forced sales the forms of law must be strictly complied with.

The sheriff in this case had advertised the property to be sold in lots of from ten to fifty acres, notwithstanding the plaintiff notified him he desired it sold in block.

This defect could not be cured in the manner attempted by the sheriff. Property advertised to be sold in lots of from ten to fifty acres, could not be legally sold in block. The plaintiff, at this stage of the proceedings, was not bound to give any directions to the sheriff, or to give any consent as to the manner of selling his property.

He had the right to require a legal advertisement, and he was not bound to waive it by giving instructions to the sheriff concerning the sale.

Judgment affirmed.

No. 415.

THE STATE OF LOUISIANA v. ZACK. MCFARLAND.

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Where certain persons, to wit: Morrison and Pickens, pretended, the one as clerk and the other as sheriff of the parish of Caddo, to hold their offices and to exercise the functions thereof under what they called the "McEnery government," in opposition to the authority of the United States and the laws and decisions of the courts of this State;

Held—That it would seem to be absurd to require an argument to show that parties occupying such positions can not be regarded as *de facto* officers of the government whose authority they contemn.

There can not be, at the same time and in the same State, two valid State governments, with two sets of officers.

No. 41 of the acts of the Legislature, session of 1873, forbids persons occupying the position therein described from performing any official act, and also prohibits all officers of the State from recognizing them or giving effect to their acts.

"Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." C. C. art. 12.

Every official act of Morrison and Pickens is, therefore, null and void, if they be in the category of persons declared to be usurpers in the first section of act No. 41 of 1873, and there is no doubt that they are in said category.

They do not hold office by virtue of any title. They never were declared elected by the Board of Returning Officers at the general election of November, 1872, neither have they been legally commissioned.

The documents called commissions, which they hold, purporting to have been issued on the fourth of December, 1872, are absolute nullities, having been issued in violation of law.

No one claiming an office by election in November, 1872, could have been commissioned except by acting Governor Pinchback or by Governor Kellogg, inasmuch as Governor Warmoth was suspended by being impeached by the House of Representatives before the promulgation of the returns of the election by the Returning Board, and his trial was discontinued in consequence only of the expiration of his term of office.

No one shall exercise the functions of an elective office by virtue of an election unless he has been declared elected according to existing laws; and in cases where the law requires the officers to be commissioned, until such commission shall have been issued. Neither of these prerequisites was observed in this case.

State of Louisiana v. McFarland.

The acts of Morrison and Pickens in assuming to act as the sheriff and clerk of Caddo after the promulgation of the law aforesaid, were in flagrant violation and contravention of its statutory provisions. Such acts are crimes, and consequently can have no legal effect. Those who themselves have violated the law by recognizing such pretended officers, must suffer the consequences of their disobedience.

The act No. 41 of 1873 does not divest vested rights. The pretended commissions of Morrison and Pickens were mere nullities.

It is not retroactive; it is not *ex post facto* in its operations; because it professedly provides only for the future. It can not, therefore, be *ex post facto*.

It does not encroach upon the powers and duties of the judiciary. It declares certain acts which were in themselves wrong and in violation of law and civil order *before* the passage of the statute, to be crimes if done *after* the passage of the law. There is no question that the subject is one over which the Legislature has jurisdiction.

It is not material to decide whether or not the act No. 41 of 1873 conflicted with the intrusion office act, and took from the courts cases that were pending under it, for the General Assembly has complete power over the subject of contests for office. It determines the mode by which these questions may be decided, and the courts have no jurisdiction over their discretion.

To maintain, as was strenuously urged in the case, that because Morrison and Pickens have not been prosecuted and convicted of their crimes, this court can not decide on the validity of their acts, is an absurdity.

It is not necessary to convict a thief of larceny in order to enable the court to decide that the title given by him of the stolen property was an absolute nullity, even in a suit to which the thief is not a party.

The pretended official acts of Morrison and Pickens are nullities, and therefore the bond which is the basis of this suit, as well as the proceedings had in the case while Morrison and Pickens were pretending to act as clerk and sheriff, are null and void.

A PPEAL from the Tenth Judicial District Court, parish of Caddo. Looney, J. W. N. Wise, District Attorney, for plaintiff and appellee. Nutt & Leonard, J. M. Lorton, for defendant and appellant.

LUDELING, C. J. Zack. McFarland was indicted for murder at the term of the Tenth District Court, in Caddo parish, held in January, 1873. He was admitted to bail by the presiding judge. Upon the failure of McFarland to appear according to the terms of his bond, judgment was rendered against him and his bondsmen. The sureties filed a motion to set aside the judgment *nisi*. It alleges that there is no indictment against McFarland to which he can be legally compelled to answer; that no legal warrant issued against him; that he was not arrested, and that the bond was not taken by any one legally authorized to take the same, and is, therefore, null and void; that the indictment was not found by a legal grand jury, and that even though the indictment be held to be valid (which is denied), still said McFarland can not be compelled to appear before this court at the present term, because the law prohibits him and all others, especially officers of the State, from recognizing in any manner usurpers in office, and because the offices of Clerk of said court and Sheriff of said parish are now usurped by S. M. Morrison and J. W. Pickens, pretending to act without authority of an election declared by the Returning Board constituted by law, and without commissions from the Governor of the State.

It further alleges that said "Morrison and Pickens have openly adhered to, recognized, and attempted to maintain the usurping gov-

ernment known as the McEnery Government; that they are usurpers, illegally assuming or pretending to be public officers, without any shadow or color of right, in defiance of law; and that all their acts, as such, being subversive of the government and in contravention of prohibitory laws, are absolutely null and void." The motion further represents that the Returning Board, constituted by law, has legally declared U. B. Holloway, Clerk, and A. Flournoy, Sheriff, of Caddo parish; that the Governor of the State commissioned them as such officers, and that they were duly qualified to act, long anterior to the date on which said indictment was filed, and that they were the only persons entitled in any manner to discharge the functions of their respective offices. It alleges that the Judge had no right to order Pickens to take the bond, and the said Pickens was without authority to take the bond, being forbidden by law from doing so, and that the bond is utterly null and void. It is further alleged that no judgment could have been rendered on said bond, or any other action taken thereon at that term of the court, because the offices of Clerk and Sheriff were violently usurped, and the lawful Clerk and Sheriff were prevented from discharging the duties of their offices by said Morrison and Pickens.

The motion was overruled, judgment was signed, and the sureties have appealed.

It is evident that, if the allegations made in the motion be true, the motion should have been maintained, as there can be no judicial proceedings in the District Court without a clerk and sheriff; and the allegations substantially amount to this, that, practically, the District Court of Caddo parish had neither of those officers acting when the proceedings in this case were had.

It is necessary, therefore, to decide whether or not S. M. Morrison and J. W. Pickens were, respectively, Clerk and Sheriff of Caddo parish during the time when the aforesaid proceedings occurred.

It appears that U. B. Holloway and A. Flournoy, Jr., were respectively declared elected to the offices of Clerk and Sheriff of Caddo parish by the Board of Returning Officers, and that they were duly commissioned as such, on the twenty-sixth day of December, 1872, by Acting Governor Pinchback. It is admitted that they qualified according to law.

It appears also that S. M. Morrison received what purports to be a commission, signed by Governor Warmoth, bearing the date of fourth December, 1872, although it was not received until twenty-third December, 1872. It is admitted he took the oath of office and gave bond. The same statement of facts is applicable to J. W. Pickens.

It appears that said Morrison and Pickens obtained possession of the buildings and records of the offices of clerk and sheriff, and that Hol-

loway and Flournoy have been asserting their rights to their offices since the date of their commissions.

S. M. Morrison was examined as a witness in this case. He says that "he has heretofore recognized the McEnery government of the State of Louisiana, and continues so to do. My commission from Governor Warmoth as clerk was received on twenty-third December, 1872, and I qualified under it the same day." His bond is not in this record, although it was offered in evidence. But it is in another record before this court. It is executed in favor of "the Governor of the State of Louisiana," without designating who is Governor of the State.

It is admitted that J. W. Pickens would make the same statements as those made by Morrison in his testimony.

It is manifest from the foregoing statement of facts that S. M. Morrison and J. W. Pickens are pretending to hold their offices, and to exercise the functions thereof, under what they call "the McEnery government," in opposition to the authority of the United States, and the laws and decisions of the courts of this State.

It would seem to be absurd to require an argument to show that parties occupying such positions can not be regarded as *de facto* officers of the government, whose authority they contemn.

The Supreme Court of the United States held the following language in the case of *Luther v. Borden*: "If it should be decided that the charter government had no legal existence during the period of time above mentioned—if it had been annulled by the adoption of the opposing government—then the laws passed by its Legislature during that time were nullities, its taxes wrongfully collected, and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not, in some cases, as criminals." 7 How. 39.

It has, however, been strenuously contended that because the said Morrison and Pickens were in possession of the offices, in the manner already stated, they were *de facto* officers, and their acts can not be attacked collaterally, and their right to said offices can not be inquired into in this collateral way; and many authorities have been cited to show that the acts of a *de facto* officer can not be questioned in a collateral manner. A question which, at this late day, it is unnecessary to refer to authorities to support. But that argument is a complete *petitio principii*. It assumes for granted the very question at issue, to wit: were those persons *de facto* officers? The quotation from the opinion of the Supreme Court, above made, negatives that position—so does common sense. There can not be, at the same time and in the same State, two valid State governments, with two sets of officers. That Flournoy, who was declared elected by the Returning Board, and who was commissioned by Acting Governor Pinchback, and who

qualified according to law, was Sheriff of Caddo parish at the date when McFarland was pretended to be arrested, the fourteenth of March, 1873, will not be disputed by any unbiased lawyer. An arrest by Flournoy, on that day, would unquestionably have been legal. If Pickens also was Sheriff, there were then two Sheriffs of Caddo. The proposition is absurd.

It is notorious that in the winter and spring of 1873, in certain localities of this State, the adherents of Colonel McEnery were in a position to obstruct the administration of justice by preventing those whom the Returning Board of elections had declared elected from exercising the functions of their offices, except with great danger of civil commotion. The General Assembly, then in session, passed, in the interest of public order and of the peace of society, the act No. 41. The title of the act unequivocally indicates the intention of the lawgiver—it is “an act declaring it a crime to usurp a public office, and providing the punishment for such offense; providing that if any public officer shall adhere to or recognize any usurper, his office shall be forfeited and considered abandoned, and directing and regulating legal proceedings to have such abandonment and forfeiture declared; authorizing the Governor to declare such forfeiture and abandonment in certain cases, and to remove such officers, and to fill the vacancies so made by appointment.”

The first section of the act declares “that if any person shall assume or pretend to be an officer of the State—executive, judicial or legislative—without authority of an election declared by the Returning Board, or without authority of a commission from the Governor of the State, in case the laws require such officer to be commissioned, such person so illegally assuming or pretending to be a public officer shall be deemed a usurper. If any such usurper shall attempt to exercise the functions of a public officer, and shall interfere with any public officer in the discharge of his duties, such usurper so interfering shall be deemed to be guilty of a crime, and upon conviction may be fined or imprisoned, at the discretion of the court, or both.” The second section declares that “if any public officer shall give adhesion to, or in any manner recognize, the authority of any person who may be usurping a public office, within contemplation of this law, such public officer so giving adhesion to or recognizing such usurper shall be deemed to have forfeited and abandoned the public office held by him, under the constitution, the laws, and the government of the State.”

Whether the penalties denounced against officers of the State who may recognize the authority of persons declared to be usurpers by the statutes can be enforced or not, it is not material to determine now.

It is sufficient, for the purposes of this case, to know that the law

forbids persons, occupying the position aforesaid, from performing any official act; and also prohibits all officers of the State from recognizing them or giving effect to their acts.

“Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed.” C. C., art. 12.

Every official act of S. M. Morrison and J. W. Pickins is, therefore, null and void, if they be in the category of persons declared to be usurpers in the first section of act No. 41 of 1873.

They do not hold office by virtue of any title having color of authority. They claim to have been elected at the general election of November, 1872. They never were declared elected by the board of returning officers, neither have they been commissioned. The documents called commissions, purporting to have been issued by Governor Warmoth on the fourth of December, 1872, are absolute nullities, having been issued in violation of law. This we had occasion to decide in the case of *Collin v. Knoblock*, and in other cases decided at the last term of this Court, at New Orleans.

We will notice, judicially, that no one claiming an office by election in November, 1872, could have been commissioned, except by acting Governor Pinchback or by Governor Kellogg, inasmuch as Governor Warmoth was suspended by being impeached by the House of Representatives before the promulgation of the returns of the election by the Returning Board, and that his trial was discontinued in consequence of the expiration of his term of office.

These facts form a part of the history of this State. It was impossible, therefore, for him to have issued commissions while he was suspended from discharging the duties of his office.

But it is hardly necessary to consider the commissions, even if they can be regarded as commissions, inasmuch as the law No. 41 declares that no one, by virtue of an election, shall exercise the functions of the office until “declared elected by the Returning Board constituted by law. The obvious meaning of the words “if any person shall assume or pretend to be an officer of the State, executive, judicial or legislative, without authority of an election declared by the Returning Board constituted by law, or without authority of a commission from the Governor of the State, in case the law requires such officer to be commissioned,” is, that no one shall exercise the functions of an elective office, by virtue of an election, unless he has been declared elected according to existing laws; and in cases where the law requires the officer to be commissioned, until such commission shall have been issued.

In the case of Morrison and Pickens it was necessary that they should have been declared elected by the Returning Board and commissioned according to law.

Neither of those prerequisites was done in the case of Morrison and Pickens; and their acts, in assuming to act as the sheriff and clerk of Caddo parish after the promulgation of the law, are in flagrant violation and contravention of statute No. 41. Such acts are crimes under the provisions of the statute, and consequently can have no legal effect; and those who themselves have violated the law by recognizing such pretended officers, must suffer the consequences of their disobedience.

Is the law constitutional? The objections urged against the law in argument were that it divested vested rights; that it is retroactive and *ex post facto* in its operations, and that it encroaches upon the powers and duties of the judiciary.

There is no force in the objections urged.

No one has, or ever had, a right to take possession of an office, except in the manner and under the conditions stipulated by law. Not having been declared elected by the officers whose province it was, under the law, to determine that question, and never having been commissioned according to law, Morrison and Pickens were usurpers before the passage of act No. 41. They had neither a vested right to the offices, nor any other kind of right thereto, as it does not appear that they contested the election; and they had no title under which they could have contested for the office under the intrusion into office act—their pretended commissions being mere nullities. *Bonner v. Lynch*, 25 An.

The law is not retroactive—it professedly provides only for the future. It can not, therefore, be *ex post facto*.

Neither does the statute trench upon the jurisdiction of the judiciary. It declares certain acts, which were in themselves wrong and in violation of law and civil order before the passage of the statute, to be crimes if done after the passage of the law.

That the subject was one over which the Legislature had jurisdiction can not be questioned seriously. It was to punish those who were conspiring against the Government by preventing the installation of its officers duly declared to be elected and commissioned. Any government which would fail to do that would be pusillanimous and unworthy the respect of a free people. If the effect of the passage of the statute be to drive those usurpers from the offices which they unlawfully retained from the legal officers, the law will have accomplished its object without any violation of right or of the constitution. It was urged, also, that this law conflicted with the intrusion into office act, and took from the courts cases that were pending under it. It is not material to decide whether it did so or not, for the General Assembly has complete power over the subject of contests for office. It determines the mode by which those questions may be decided, and

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the courts have no jurisdiction over their discretion. *Bonner v. Lynch*, Cooley's Const. Lim. 174.

It was also strenuously argued that until Morrison and Pickens had been prosecuted and convicted of their crimes, the courts could not collaterally decide that they were usurpers under the statute. Thus, in this case, according to that view, the sureties on the bond upon which judgment is asked can not allege and show that there exists no obligation against them, inasmuch as the indictment, the warrant, the arrest, and the bond given in the case of *The State v. McFarland*, were absolute nullities and without effect, in consequence of the fact that Morrison, who pretended to act as clerk of the court in which said proceedings were had, and Pickens, who pretended to act as sheriff in said proceedings, were usurpers, and were acting in defiance of act No. 41, because Morrison and Pickens have not been convicted of their crimes; that is, that we can not decide the very matter at issue, to wit: Are the acts of Morrison and Pickens nullities, or are they valid? The proposition is absurd.

It is not necessary to convict a thief of larceny in order to enable the court to decide that the title given by him of the stolen property was an absolute nullity, even in a suit to which the thief is not a party.

We think the statute No. 41 of the General Assembly of 1873 is, so far as applicable to this case, valid and obligatory upon all citizens. The pretended official acts of S. M. Morrison and J. W. Pickens are nullities, and therefore the bond, which is the basis of this suit, as well as all the proceedings had in the case while Morrison and Pickens were pretending to act as clerk and sheriff, are null and void.

It is therefore ordered and adjudged that the judgment and proceedings in this case be declared null and void, and that the proceedings be dismissed.

No. 408.

DUNCAN KENNEDY, JR., et als. v. ROBERT C. RUST et als.

A having made a surrender in bankruptcy and become a discharged bankrupt, whose property was sold by his assignee, a suit could not be instituted against him on certain mortgage notes reposing on said property; he was no longer a party in interest, and could not be represented in the case by the curator *ad hoc* appointed for that purpose and upon whom citation was served. Such proceedings were mere nullities. There was then no citation, and prescription took effect against the notes upon which the judgment was predicated.

The plea of prescription filed in this court by defendant against plaintiffs, who allege the nullity of the judgment he relies upon, is not well taken. The plaintiffs, in pursuit of their rights, finding themselves opposed by what purports to be a superior mortgage to theirs, have the right to attack it and show its nullity.

A PPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiffs and appellees. *Frank. P. Stubbs*, for defendant and appellant.

TALIAFERRO, J. Three several creditors having judicial mortgages, join together to enforce their several mortgages against a tract of land and plantation in the parish of Ouachita, owned by the defendant, Robert C. Rust, and in his possession. The property thus proceeded against by the hypothecary action was formerly owned by Albert Rust, who died in April, 1872, in the State of Arkansas, his proper residence, and who never resided or had a domicile in Louisiana. Albert Rust, in 1868, became a bankrupt in the United States District Court for the Eastern District of Arkansas. His property, among which was his tract of land and plantation in Ouachita, which these plaintiffs are proceeding against, was sold by his assignee in bankruptcy, subject to the mortgages and incumbrances upon it. The Ouachita land was purchased by one Charles B. Moore, who subsequently sold it to the present defendant, Robert C. Rust.

In April, 1861, Albert Rust, residing in Arkansas, being indebted to James Brander, of New Orleans, in the sum of \$12,099, executed four several notes in favor of Brander, making in the aggregate the said sum of \$12,099, each of the notes bearing interest from its maturity, two of them maturing first of February, 1862, and the other two on the first of February, 1863. To secure the payment of these notes, Rust executed a mortgage, before a notary in New Orleans, on the Ouachita plantation. This mortgage contains the pact *de non alienando*, expressly stipulating that "the mortgageor consents and agrees that any and all legal proceedings for the recovery of the amount of said notes, or any part thereof, and for the foreclosure of this mortgage, may be instituted and carried to final judgment and execution in any of the district courts of New Orleans, renouncing the benefit of any and all laws providing that defendants can only be sued or proceeded against before the judge of the parish or district wherein they reside or have their domicile."

In November, 1869, W. A. Johnson, of New Orleans, having become owner of the unpaid notes of Rust to Brander, and also of the mortgage securing them, brought suit in the Seventh District Court of New Orleans to enforce the mortgage, although Rust had made a surrender in bankruptcy and received his discharge. Treating Rust as an absentee, and as still in possession of the property, he caused M. A. Foute, an attorney at law, to be appointed curator *ad hoc*, and had the citation and a copy of the petition served upon him in that capacity. A judgment was rendered in favor of the holder of the notes recognizing the debt and mortgage, and making the same executory. This judgment was rendered on second of January, 1870. Execution was issued directed to the sheriff of Ouachita, and the mortgaged property was seized in March, 1870, and advertised for sale, but the sale was enjoined by Robert C. Rust, administrator of A. Rust. In May follow-

ing, John M. Sandidge became subrogated to the rights of Johnson by notarial act. Sandidge may be regarded as the real defendant in this case.

The three creditors of Albert Rust, who are proceeding, as we have seen, by hypothecary action against the property in question, alleging that the sum claimed, by virtue of this mortgage claim of Sandidge, exceeds the value of the property, and, if enforced, would deprive them of receiving any portion of the proceeds of the property mortgaged, combine with their hypothecary action a prayer that the judgment of the Seventh District Court of New Orleans be annulled, and the mortgage of Sandidge canceled. They allege:

First—That the Seventh District Court of New Orleans, which rendered the judgment, was without jurisdiction either of the person or mortgaged property.

Second—That neither the property mortgaged nor the mortgageor were properly represented by the appointment and service of M. A. Foute as curator *ad hoc*.

Third—That the notes which formed the basis of the judgment of Johnson and Sandidge were prescribed at the inception of the suit.

Fourth—That Albert Rust at the time of the waiver of prescription on the notes, was insolvent and therefore incapacitated from making any acknowledgment or waiver to the prejudice of other creditors.

The judgment of the lower court recognized the three several judicial mortgages, and ordered the property mortgaged to be sold and the proceeds applied to the payment of these mortgages respectively. The judgment further decreed that the special mortgage of Rust to Brander, to whose title Sandidge is subrogated, be canceled from the mortgage records of the parish of Ouachita, so far as it affects the said judicial mortgages. From this judgment the defendant, Sandidge, has appealed.

We think the plea of prescription must be fatal to the defendant's claim in this case. At the time of the institution of the suit by Johnson, in the Seventh District Court of New Orleans, against Albert Rust, the latter was a discharged bankrupt. He had made a surrender in bankruptcy, the property in controversy had been sold by the assignee. Rust was no longer a party in interest. He could not be represented in this case by the curator *ad hoc* appointed for that purpose, and upon whom the citation was served. The appointment of a curator *ad hoc* and the citation served upon him were simply nullities. There was then no citation, and prescription took effect against the notes upon which the judgment is predicated.

The contested question as to the waiver of prescription it becomes unnecessary to consider. If prescription had not accrued at the time the waiver was made it became complete from and after that time.

Kennedy, Jr., et als. v. Rust et als.

The plea of prescription filed in this court by defendant against plaintiffs' action is not well taken. The plaintiffs, in pursuit of their rights, find themselves opposed by what purports to be a superior mortgage right to theirs, had the right to attack it and show its nullity.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

No. 404.

DAVID PIPES, SR., v. WOODRUFF NORSWORTHY. B. H. NORSWORTHY, Intervenor.

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The defendant in this suit has no interest in disputing the ownership of the judicial mortgage obtained against Parks, which is sought to be enforced by plaintiff on land which defendant holds under said Parks. If it should be discharged by him, the discharge would protect him against Morgan & Todd, the alleged transferees, who, by appearing as counsel for plaintiff, and signing the petition alleging his ownership of the judgment, would be estopped from disputing his title; or if defendant's land should be subjected to the mortgage resulting from said judgment, no controversy could arise hereafter in relation to it at the suit of Morgan & Todd, the alleged transferees.

Besides, if, as alleged by defendant, the pretended transfer of the judgment was a nullity, because it was the sale of a litigious right, the title of it remains in the plaintiff, and of course he has the right to its enforcement.

As to the plea of prescription, this defense was unsuccessfully made by Parks, the judgment debtor, and as the judgment was rendered before defendant bought the land from Parks and before his adverse interest accrued, he was not in any manner injured by it. The judgment becoming final for Parks, is also conclusive against defendant.

It is those creditors, whose claims exist at the time an improper judgment is rendered, that have cause to complain, because they only are injured by it. The third possessor of mortgaged property certainly occupies no better position than a creditor.

The allegation that Parks never owned the land in question, and therefore that the mortgage never took effect upon it, works fatally against the defendant, who raised this objection. If Parks, the author of defendant's title, never owned the land, it follows that defendant does not own it and can not be injured by this suit. Repudiating the title of Parks, he repudiates his own, and puts himself out of court.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. D. O. Morgan, Todd & Brigham*, for plaintiff and appellant. *Newton & Hall, O. F. Dunn and R. G. Cobb*, for defendant and appellee.

WYLY, J. In July, 1866, the plaintiff, David Pipes, obtained judgment for \$7810 20 against William A. Parks, who took an appeal to this court, and who went into bankruptcy pending that appeal. Brigham & Morgan bought the judgment of the plaintiff pending the appeal, which was afterwards dismissed by consent of parties, E. E. Norton, the assignee, acting therein in behalf of Parks.

This judgment had been duly recorded before Parks became a bankrupt, and of course, it became a judicial mortgage on his property.

William A. Parks was the administrator of the succession of his father, Levi Parks, and was also a beneficiary heir. At probate sale he purchased the plantation which belonged to his father's succession.

He subsequently sold one undivided third of said plantation to the defendant, Woodruff Norsworthy, and the other two-thirds to Brigham and Gale. Norsworthy afterwards acquired Gale's part of the land, making him the owner of two-thirds of the plantation. Brigham went into bankruptcy and surrendered his third interest in the plantation. The plaintiff now brings this hypothecary action to subject the two-thirds of the plantation owned by the defendant to his judicial mortgage which was attached to the plantation when it was owned by William A. Parks, the author of defendant's title.

The issues presented by the pleadings are as follow :

First—That Pipes was not the owner of the judgment or mortgage sought to be enforced, and the suit could not be instituted in his name.

Second—That one-half of the debt on which the judgment was based was extinguished by prescription.

Third—That the judgment had been sold to Morgan & Brigham, attorneys at law, pending the appeal, and it was the sale of a litigious right, and therefore null.

Fourth—That William A. Parks was never the owner of the land in question, consequently the judicial mortgage never took effect on the land.

Fifth—That one-third of the mortgage was extinguished by confusion, by virtue of Brigham having been one-third owner of the plantation, and at the same time one-half owner of the judgment or judicial mortgage.

It appears that Brigham's interest in the judgment sought to be enforced was transferred to R. B. Todd, an attorney at law. And it appears that this hypothecary action was brought in the name of the plaintiff, the original owner of the debt, and the plaintiff in the suit which resulted in the judgment now sought to be enforced on the land of the defendant. Notwithstanding the transfer of the judgment, Morgan & Todd, by appearing as counsel for the plaintiff, and signing the petition alleging his ownership of the judgment, would be estopped from disputing his title; and it is proved that the plaintiff authorized this suit to be brought. What interest has the defendant in disputing the ownership of the judgment? If it should be discharged by him, the discharge would protect him against Morgan & Todd, the alleged transferees, or if the land should now be subjected to that mortgage, no controversy could arise hereafter in relation to it at the suit of Morgan & Todd. It is not pretended that the alleged transfer of the judgment in any manner prevents the defendant from making such defenses as he could make without it.

Besides assuming his third ground of defense to be true (and he certainly can not object to this assumption), the pretended transfer of the judgment was a nullity, because it was the sale of a litigious

right. Therefore, if the truth of the third ground be conceded, which is that the transfer of the judgment was a nullity, there is not the least difficulty in disposing of the first ground, because, as the transfer to Morgan & Todd was a nullity, the title of the judgment remains in the plaintiff. and, of course, he has the right to enforce his own judgment.

As to the objection that one-half of the debt on which the judgment was based was extinguished by prescription, we will remark that that defense was unsuccessfully made by Parks, the judgment debtor, and, of course, the judgment became final and conclusive against him. As this judgment was rendered before the defendant bought the land from Parks, and before his adverse interest accrued, he was not defrauded or in any manner injured by it, even though it were without consideration and prescribed. It is creditors whose claims exist at the time an improper judgment is rendered that have cause to complain, because they only are injured by it. The defendant, the third possessor of mortgaged property, certainly occupies no better position than a creditor. Besides, the judgment can not be attacked collaterally. As to the objection that William A. Parks never owned the land in question, and therefore the mortgage never took effect upon it, we will remark that setting up title under Parks, the defendant is estopped from disputing with the plaintiff on this point. If Parks, the author of his title, never owned this land, the defendant does not own it and can not be injured by this suit; he has no cause to complain, because, when he repudiates Parks' title, he repudiates his own. This argument puts him out of court, because deriving possession and title from Parks, when he repudiates or disclaims these he has no further interest in the contest. Disowning Parks' possession and Parks' title, which alone give him an interest in this case, the defendant has no more right to contest with the plaintiff about the land in question than any other citizen of the parish of Morehouse.

As to the fifth ground, to wit: that one-third of the mortgage was extinguished by confusion, because Brigham owned one-third of the plantation, and at the same time owned one-half the judgment, we will remark there is no force in it. Brigham owned half of the judgment, it is true, but he never occupied for a moment the position both of creditor and debtor for any part of said judgment. It is true, he owned one-third of the plantation in controversy, which he surrendered in bankruptcy, and which is not embraced in this litigation.

As to that share of the land, of course, there was confusion as to one-half the amount of the mortgage. That is, the judgment was, in no manner, reduced, but its effect as a mortgage ceased to the extent of one-half on that part of the land purchased by Brigham. No part of the judgment was paid. If Brigham had bought the whole tract,

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instead of one-third, of course it would have been relieved of the mortgage by confusion; but this would not release the judgment as a mortgage to its full amount on any other lands owned by Parks at the time of the registry of said judgment.

As to the plea of discussion, no money was tendered by the defendant to carry it on; besides, Parks had gone in bankruptcy, and the property being in the jurisdiction of the bankrupt court, could not be discussed by process of the court *a qua*.

It is therefore ordered that the judgment herein in favor of the defendant be annulled; and it is now ordered that there be judgment for the plaintiff recognizing his judicial mortgage herein on the land in controversy, and ordering it to be sold according to law to pay the judgment, interest and costs set up by the plaintiff herein; and it is further ordered that the plaintiff recover judgment against the defendant for costs of this proceeding in both courts.

Rehearing refused.

No. 352.

LOUISIANA MUTUAL INSURANCE COMPANY v. WALTERS & ELDER.

Where Elder, one of the defendants, had been cited as a member of the commercial firm of Walters & Elder, in a suit on certain drafts, and it was alleged and proved, in defense, that said drafts had been given out of the usual course of the partnership business, without any authority, and not on account of the partnership, but where it was also proved that Elder had signed the drafts;

Held—That he can not deny his authority to make the drafts, and that he is personally responsible for the amount thereof.

The firm was sued, but evidence was received without objection which established his personal liability. He is bound by this proof.

The objection that there was no notice of dishonor is not valid. The drawer had no funds in the hands of the drawee, and long after the drafts were due, and with the knowledge that they had not been protested, he frequently acknowledged his liability thereon and promised to pay them.

There is no force in the position that Elder gave the drafts for a balance on the compromise of a debt due by the estate of one Pomroy. As the representative of the estate, he could not bind it by drawing drafts, but be bound himself.

APPEAL from the Tenth Judicial District Court, parish of Caldo. *Leridee, J. Egan, Williamson & Wise, Race, Foster & Merrick*, for plaintiffs and appellees. *Land & Taylor*, for Elder, defendant and appellant.

LUDELING, C. J. This is a suit on two drafts, dated thirtieth May, 1868, drawn by Walters & Elder to the order of the Louisiana Mutual Insurance Company, on William Cooper, who accepted them, and they were due on the first November and first December, 1868.

The defendants, after pleading a general denial, aver that, at the time the drafts were given, the succession of E. H. Pomroy was largely indebted to the plaintiff; that David J. Elder was executor of said suc-

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cession, which was well known to the plaintiff; that said executor gave the drafts in settlement of said indebtedness, and the acceptor accepted the drafts as agent of said executor and at his request. They aver that D. J. Elder had no authority to sign the firm name to said drafts; that it was an act out of the usual course of the partnership business, and the plaintiff knew that said Elder acted in this transaction as executor of said succession, and in order to compromise a debt due by the succession. They aver that they never received any consideration whatever for the drafts, and that the plaintiff knew they had no interest in the payment of the debts of the succession of Pomroy. After the testimony of the president of the Louisiana Mutual Insurance Company had been filed in the lower court, the plaintiff's counsel caused a citation to be issued addressed to D. J. Elder, individually. This was served and a default was taken in the case against D. J. Elder. Subsequently Elder appeared and moved to set aside or annul the citation addressed to him in his individual capacity, and the default taken thereon, on the ground that this suit was against the commercial firm of Walters & Elder, and that no judgment could be rendered against him personally, except as a member of the firm.

The judgment of the court *a qua* sustained the motion to set aside the citation to D. J. Elder individually and the default thereon; it rejected the plaintiff's demand against Walters & Elder, but it condemns D. J. Elder individually to pay the amounts claimed in the petition against the firm for using the firm name without authority. From this judgment D. J. Elder alone appealed. The firm of Walters & Elder, therefore, is not before this Court, except, perhaps, as one of the appellees—and, as between the appellees, no change can be made in the judgment.

The appellant complains that he has been condemned in a suit to which he is not a party. And we think his complaint is well founded. Without deciding whether the citation addressed to him individually, in a suit against the firm of which he was a partner, could have the effect of changing the character of the demand or not, it is sufficient to know that his exception to this mode of procedure was sustained by the judge *a quo*, and no appeal was taken from the judgment sustaining the exception and annulling the citation. He was not before the court in his individual capacity, and, therefore, no judgment could be rendered against him individually.

The object of pleading is notice, and the capacity in which one is sued should be clearly stated: "The party sued ought to be clearly instructed why he is sought to be condemned, and not left to infer it from doubtful and obscure allegations," or from matters *dehors* the petition. 1 N. S. 204; Brown & Co. v. Richardson, 17 An. 176; 19 An. 186.

We are referred by the counsel for the plaintiff to the case of *Derbigny v. Mondelli et al.*, (15 La., 496), as settling the right of the plaintiff to recover judgment against Elder, individually, under the pleadings and evidence in this case. In the case referred to the only question was whether or not Mondelli was bound *in solido*, and the court held that by his answer Mondelli had admitted his liability for half the note, and had himself put "in issue the particular partnership out of which, he contends, this contract arose," and for that reason they held that he had shifted the onus of proof to himself to show that the partners had consented to the obligation, or that the contract enured to the benefit of the partnership. It must be borne in mind that Mondelli alone had been cited to answer the demand. In the case at bar, the firm of Walters & Elder alone have been cited. In the Mondelli case, where he alone was sued, the court gave judgment against him for the whole debt created by himself, in the name of an ordinary partnership. We fail to discover the analogy between the two cases. If D. J. Elder, individually, had been sued on the drafts, instead of the firm of Walters & Elder, then there would have been some analogy between the cases.

It is therefore ordered and adjudged that the judgment of the District Court be annulled, and that there be judgment rejecting the plaintiff's demand, with costs of both courts.

ON REHEARING.

LUDELING, C. J. In our former opinion we said that the appellant had been condemned without being before the court. This was an error. He had been cited as a member of the commercial firm of Walters & Elder. The defense to the drafts sued on was that they were given out of the usual course of the partnership business, without any authority, and not on account of the partnership. And this defense was proved; but it was also proved that the appellant, Elder, signed the drafts. He can not deny his authority to make the drafts. The judgment against him for the amount of the drafts was therefore correct. 2 Hill, 200, *Hawks v. Munger*; 13 Peters, 119.

The judgment may also be maintained on another principle. The firm was sued, but evidence was received, without objection, which established the liability of Elder personally. He is bound by this proof. 20 An. 241.

There is no force in the objection that there was no notice of dishonor, as it is proved that the drawer had no funds in the hands of the drawee, and that long after the drafts were due, and with the knowledge that they had not been protested, Elder frequently acknowledged his liability thereon and promised to pay them.

Louisiana Mutual Insurance Company v. Walters & Elder.

Neither is there any force in the position that he gave the drafts for a balance, on a compromise of a debt due by the estate of Pomroy. Elder, the representative of the estate of Pomroy, could not bind the estate by drawing drafts, but he bound himself.

It is therefore ordered that the decree of this court heretofore rendered in this cause be set aside, and that the judgment of the lower court be affirmed, with costs of appeal.

No. 381.

ROGERS & WOODALE v. JASPER GIBBS.

'The omission' in the transcript of the testimony, not reduced to writing, of one of the plaintiff's counsel, in reference to an incident of the trial, is not sufficient ground to dismiss the appeal, when the substance of the testimony is brought up in the bill of exceptions taken to the ruling of the Judge on the subject.

Where a commercial firm, the payees of two promissory notes, due respectively in 1862 and 1863, instituted, in April, 1870, suit against the indorser thereof, and where, on the payment thereof being established by notarial act, plaintiffs attempted to prove that it was made in Confederate notes, and contended that said payment was in violation of the non-intercourse laws, having been made at Shreveport, within the Confederate military lines, to one of the plaintiffs, who was a resident of New Orleans, then within the Federal lines, and whose authority, therefore, to represent the firm as its agent ceased to exist;

Held—That whatever might be said of the acts of the said party in going through the prohibited lines, and its legal effects upon any contracts of his own or his firm, said firm, or any one of its members, can not now invoke the illegality of the said payment, or enforce a second payment. They can not be heard to urge their own unlawful conduct to their own benefit. The payment under such circumstances must be held binding upon both plaintiffs.

A PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. L. B. Watkins and T. & J. W. Young*, for plaintiffs and appellants. *J. D. Watkins and A. B. George*, for defendant and appellee.

HOWELL, J. This suit was instituted in April, 1870, by the payees against an indorser of two notes made in April, 1860, and due respectively in April, 1862 and 1863, with interest from date. The answer, besides a general denial, contains a special denial of demand, protest and notice, and the plea of payment in July, 1863, by the first indorsers. Judgment was rendered in favor of defendant, and plaintiffs appealed.

A motion is made to dismiss the appeal because the transcript does not contain all the evidence. The omission alleged is the testimony of one of plaintiffs' counsel, taken on his motion to have the representative of plaintiff Woodale, whose death was suggested, made a party. The testimony was not reduced to writing, but its substance is brought up in the bill of exceptions taken to the ruling of the judge on the subject, which we consider sufficient, referring merely to an incident of the trial, and there is, therefore, no ground for a dismissal of the appeal.

Rogers and Woodale v. Gibbs.

This bill of exceptions is pressed on our attention, and was taken to the refusal of the judge to permit plaintiffs' counsel to file a written motion suggesting the death of said Woodale, and asking to make his legal representative a party, and the affidavit of the said counsel that he had recently heard of the said death, and believed his information to be true. Objection was made, and the affiant was examined as a witness, and his testimony made the report of the suggested death so improbable in the opinion of the judge that he refused the application. We think the filing of the documents should have been allowed, and the subsequent action could have been had as well. But their contracts and the statements of the witness are in the bill of exceptions, and we think the judge did not err in refusing to continue the case to make parties. The report of the death was altogether too vague and indefinite to be the basis of judicial action.

On the merits, we think the judge decided correctly. The payment, as alleged, was proven by a notarial act. But the counsel of plaintiffs attempted to prove that it was made in Confederate notes, and they contend that it was so made in violation of the non-intercourse laws, having been made in Shreveport, within the Confederate military lines, to the said plaintiff, who was a resident of New Orleans, then within the Federal lines, and whose authority, therefore, to represent the firm as its agent ceased to exist. Whatever may be said of the act of the said party in going through the prohibited lines, and its legal effects upon any contracts of his own or his firm, we do not think the firm or its members can now invoke the illegality of the said payment and enforce a second payment. They can not be heard to urge their own unlawful conduct to their own benefit. The payment under the circumstances must be held binding upon both plaintiffs.

Judgment affirmed.

No. 401.

WILLIAM SANDEL v. D. B. DOUGLAS, Sheriff, et al.

It has often been held that the signature of the appellant is not necessary to the appeal bond, his obligation to discharge any judgment rendered against him on the appeal resulting from the judgment itself. Hence if the counsel in this case was without special authority, as alleged, to sign for the appellant, it is no ground to dismiss the appeal.

An intervenor is entitled to the delay necessary for service of citation and putting the intervention at issue.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. R. G. Cobb, S. D. McEnery*, for plaintiff and appellee. *Todd & Brigham, R. W. Richardson*, for defendants and warrantors. *D. O. Morgan*, for intervenors.

HOWELL, J. The plaintiff sues the sheriff and the plaintiffs in two writs of execution, issued in their suits against Mrs. S. A. Bell, sepa-

rate in property, for twenty-seven bales of cotton or their value, which he alleges are a part of the crop raised by him on the plantation of said Mrs. Bell, rented to him for the year 1869, and which the said sheriff illegally seized and carried away. He also claims damages for injury to the cotton, and attorney's fees. The defendants plead the general denial, with a special denial of the alleged lease, and the averments, that if an act of lease was executed, it was made by the husband of Mrs. Bell, without authority, and was a mere simulation, intended to screen the crop grown on the plantation from the creditors of Mrs. Bell, who was insolvent to the knowledge of this plaintiff; that Bell, the husband, was intoxicated and incapable of contracting when he signed said act; that the cotton was a part of the crop growing on the mortgaged land at the time of the seizure, and was a part of the same, and the mortgagee's right to seize and sell it could not be impaired or affected by the mortgageor or other person without their consent.

On the day on which the case was fixed for trial, Mrs. Bell, with the leave of court, filed an intervention, claiming to be the owner of the cotton in controversy, denying that plaintiff leased her plantation, as alleged, averring that the lease set up was unauthorized by her, and that the seizure of the cotton was not authorized by the writs in the hands of the sheriff, and praying that the plaintiffs and defendants be cited, and that she be decreed the owner of the said cotton, and obtain delivery thereof or its value. She then moved a continuance for service of citations and forming issues between the parties, stating that the opposite parties refused to accept service and put the intervention at issue, and that if they would do so, she was ready to proceed with the trial; but the court refused, on the ground that the intervenor should not be allowed to delay the trial of the principal cause, the trial of which was immediately proceeded with, the intervenor taking her bill of exceptions. Judgment was rendered in favor of plaintiff for a greater part of his claim, and the defendants and intervenor have prosecuted this appeal.

The plaintiff and appellee moves to dismiss the appeal of the intervenor, on the ground that the appeal bond was not signed by her, but by her counsel, who was without authority to do so, it appearing that she was not absent from the parish.

It has often been held that the signature of the appellant is not necessary to the appeal bond, his obligation to discharge any judgment rendered against him on the appeal resulting from the judgment itself. Hence if the counsel in this case was without special authority, as alleged, to sign for the appellant, it is no ground to dismiss the appeal.

The motion is, therefore, overruled. According to the construction

Sandel v. Douglas, Sheriff, et al.

which has long been given to articles 391 and 393 of the Code of Practice, an intervenor is entitled to the delay necessary for service of citation and putting the intervention at issue. See 16 L. 265; 3 An. 331; 20 An. 258. The court *a qua*, therefore, erred in not granting the delay asked for in this case by the intervenor, as shown by the bill of exceptions, and the cause must be remanded on this account.

It is therefore ordered that the judgment rendered herein (being No. 4880 of the District Court) be reversed, and that this case be remanded, to be proceeded in according to law, plaintiff and defendants paying costs of appeal.

No. —

WILLIAM SANDEL v. D. B. DOUGLAS, Sheriff, et als.

HOWELL, J. This case is embraced in the record with the one of the same title just decided, the evidence by agreement in each being used in both, although the defendants are not all the same.

In this case the plaintiff sues the sheriff and the sureties on his official bond for five bales of cotton or their value, which he says belong to him, by having raised two and purchased the others, and which he charges were illegally and fraudulently seized by the sheriff, under writs of execution, in the suits of Francke & Danneel v. S. A. Bell, and B. Selbornagh & Co. v. S. A. Bell, in the district court, and a writ of attachment in the suit of S. J. Futch v. William Henry, in the parish court. He also claims damages for attorney's fees, trouble, expenses, etc., growing out of the taking of said cotton, and a further damage from a decline of two cents per pound in the value of the cotton. He made R. A. Phelps, the present sheriff, a party, on the allegation that two of said bales had been turned over to him by his predecessor, Douglas.

Douglas and his sureties excepted to the jurisdiction of the district court, on the ground that by the allegations two bales of the cotton claimed had been delivered to the acting sheriff, and the value of the remainder is less than five hundred dollars, and the claim for damages is purely fictitious. This exception was properly overruled. The prayer is for the five bales, alleged to be worth over five hundred dollars, and the demand against Phelps is in the alternative. Douglas and his sureties answered by a general denial, and averred that Douglas was acting in his official capacity under the writs described in the petition, and had seized the plantation of Mrs. Bell with the growing crop thereon, as he was expressly commanded in the writs, and therefore incurred no liability; that all the cotton seized and afterward

baled was turned over to his successor in office; that if any part thereof was ever in the possession of plaintiff, his possession was illegal; that under the writ of attachment, in suit of S. J. Futch v. William Henry, one bale was seized and stored in courthouse, and burned with said building; but it is denied that said bale belonged to or was in the possession of plaintiff; that plaintiff never rented the plantation of Mrs. Bell for the year 1869; that the pretended lease, if it existed in writing, was without the authority of Mrs. Bell, and was a fraudulent simulation to screen the property of Mrs. Bell from her creditors; that it was signed by her husband when from intoxication he was incapacitated to contract, and the lease was repudiated by the wife; that if the sheriff and his sureties incurred any responsibility, the plaintiffs in the said writs are their warrantors. Their prayer was in accordance with their obligations. Phelps filed an answer, but as no judgment was rendered against him, and none is asked from us, it is unnecessary to notice it. The alleged warrantors seem not to have been made parties. After trying the issues thus presented, the judge *ad hoc* gave judgment in favor of plaintiff against Douglas and his sureties, ordering them to deliver to him three bales of cotton marked W. S., and in default thereof pay him \$312, and to pay eight per cent. thereon from February, 1870, as damages, with all costs, rejecting the demand against Phelps, and the demand of plaintiff for attorney's fees and other damages. In this court he has asked an amendment of the judgment in this last respect, and as to the two other bales.

The evidence is satisfactory, that the three bales of cotton for which he obtained judgment were purchased by him from the laborers on the plantation, and were a part of their compensation for their labor. The plaintiff was in possession when they were taken by Douglas, who was informed of the facts, but refused to return the said cotton. Under these circumstances the plaintiff is entitled to his cotton or its value at the time it was illegally taken from him, even though he may not have been the lessee of the plantation on which it was raised. As to the two bales marked "Zone," claimed as a part of plaintiff's crop, and the damages for attorney's fees, trouble, etc., we think the record and the law sustain the judgment of the lower court. The evidence does not include the three recovered within the alleged agreement of counsel and parties to sell, the proceeds to abide the result of the litigation. But eight per cent. was erroneously allowed.

It is therefore ordered that the judgment appealed from herein (being suit No. 4927 in the lower court) be amended so as to reduce the interest from eight to five per cent., and that as thus amended said judgment be affirmed, plaintiff to pay costs of appeal.

Rehearing refused.

No. 409.

SAMUEL WHITED, Tax Collector, v. Mrs. M. J. LEWIS and HUSBAND.

The fact whether or not a law has been duly promulgated may be within the province of the judiciary, but whether or not it went regularly through all the stages necessary for its passage as a law up to the promulgation, is a subject confined to other departments of the constitution.

The eleventh section of act 81 of the regular session of 1872, promulgated on the thirteenth April, 1873, amending the charter of the town of Monroe, was not passed in violation of the formalities required by the constitution. The objects embraced in said section of said act are embraced in the title.

In 6 An., 695, it is said: "When portions of a law come within the reasonable intendment of its title, and others do not, the latter alone are unconstitutional, provided they can stand alone." This properly applies to the aforesaid section.

The right of a party to raise the question of the constitutionality of a law is limited to the provisions thereof which affect his interest in the litigation.

Section 11 does not violate, as alleged, the uniformity and equality of taxation, because it exempts some property and persons in the town of Monroe, within the limits of the parish of Ouachita, from taxation to which other inhabitants of the parish are subject, and because the Legislature can only exempt "property actually used for church, school and charitable purposes."

The power to tax property within the parish of Ouachita and require licenses from the inhabitants thereof, was conferred by the Legislature on the police jury, and the exercise of that power is only curtailed by the section of the law which exempts the town of Monroe.

The Legislature conferred the power of taxation on each subdivision of the local government—the police jury of the parish and the municipal authorities of the town of Monroe—and had the right to withdraw or modify that delegation as to each or both.

The act was not retroactive. It merely withdrew a delegated power which had not yet been exhausted, and destroyed no vested right in the police jury.

Where it was contended that section 3493, R. S., did not authorize the Secretary of State to promulgate an act of the Legislature that had not received the Executive sanction, as was the case in this suit;

Held—That this is too restricted an interpretation of the functions of the Secretary of State when connected with article 66 of the constitution.

The act in question was necessarily presented to the Governor, but was published without his signature. Although not drawn up with such precision and fullness as might be done, a fair construction of section 3493, R. S., in the light of the various articles of the constitution having any reference to the subject, will afford authority in the Secretary of State to deliver to the State Printer for publication all bills in the category of this one, with the statement that they became laws without the signature of the Governor.

A bill becoming a law without the Governor's signature must be promulgated as well as one with his signature, and all bills must be promulgated through the office of the Secretary of State.

It may not be sacramental, under existing legislation, that he shall state, or add in a note, that it became a law without the signature of the Governor, and how it so happened; but the court can not say that, under all the provisions of the constitution and the laws on the subject, his doing so will destroy the law, or prevent a bill in such a contingency from becoming a law.

A PPEAL from the Parish Court, parish of Ouachita. *Baker, J. Garrett & Garrett, A. L. Slack*, District Attorney *pro tem.*, for plaintiff and appellee. *R. G. Cobb*, for defendants and appellants.

HOWELL, J. Plaintiff, as collector of parish taxes, sues defendant for \$100, as the license, fixed by an ordinance passed by the Police Jury of Ouachita, on the business of keeper of a hotel in the city of Monroe. The defense is that by the eleventh section of act 81, of the regular session of 1872, promulgated on the thirteenth of April, 1873, amending the charter of Monroe, all property situated in Monroe, and

Whited, Tax Collector, v. Mrs. M. J. Lewis and Husband.

persons following trades, occupations and professions therein, are exempted from paying taxes or licenses to the parish.

In reply the plaintiff says that said act was not passed in conformity with the formalities required by the constitution, and is in violation of articles 114, 115, 118 and 110 of said instrument.

First—In the case of the Louisiana State Lottery Company v. Richoux et als., 23 An. 743, it was held that courts will presume that the constitutional rules laid down for the passage of laws have been complied with by the lawmaker, and when duly promulgated will accept them without inquiry as to the observance or non-observance of such rules. Assuming the regularity of the promulgation of the law under consideration, we must, under this rule of jurisprudence, accept it as having been passed, as promulgated, upon the observance of all the rules prescribed for the enactment of laws. Any alleged discrepancy, therefore, in the title as adopted by one house and that as adopted by the other, is not a subject of judicial inquiry. The fact whether or not a law has been duly promulgated, may be within the province of the judiciary; but whether or not it has regularly passed through all the stages necessary for its passage as a law up to the promulgation, it seems now settled in this State, is a subject confined to other departments of government.

Second—Does the title express the objects of the law? Article 114. As the eleventh section only of said act is involved in this controversy, we have simply to ascertain if the object or objects embraced in it are expressed in the title. In 6 An. 605 it was said, “when portions of a law come within the reasonable intendment of its title, and others do not, the latter alone are unconstitutional, provided they can stand alone.” This properly applies to the section under revision, it containing independent matter. See, also, 21 An. 309, 448. In these cases the right of a party to raise the question of the constitutionality of a law was limited to the provisions thereof which affected his interest in the litigation.

Referring to the title and section of the law attacked herein, we consider the objects of the latter embraced in the former. The act is professedly amendatory. Its title reads, “An act to amend and re-enact sections one, two, three, seven, and the ninth paragraph of section nine, to add a twenty-first paragraph to section nine, and to amend and re-enact sections nineteen, twenty, twenty-one and twenty-eight of the act entitled an act to incorporate the city of Monroe, to fix its boundaries, to provide for the government, and create a recorder’s office for the same, approved May 4, 1871, and after the first day of January, 1873, to exempt all property, real and personal, and all persons, firms or corporations within the corporate limits of the city of Monroe from the payment of parish taxes and licenses, and to provide

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for the payment of costs and fees in criminal cases, originating within said corporate limits."

The eleventh section reads: "That all real and personal property within the corporation of the city of Monroe, and all persons, firms and corporations within the said corporation, be and the same are hereby exempted from all taxes and licenses levied by the parish of Ouachita from and after the first day of January, 1873; provided, that the city of Monroe shall be liable for the expenses in all criminal cases originating within its corporate limits; and the clerk of the district court and the sheriff of the parish of Ouachita shall collect their fees in such cases from the corporate authorities of the city of Monroe, and not from those of the parish of Ouachita."

It is objected that the whole object, announced in the title, as to costs and fees in criminal cases, is not effected or carried out in the eleventh section. This implies that the object of the law in this respect is expressed in the title, and whether any costs and fees besides those of the clerk or sheriff can be collected from the city of Monroe or not is a question to be settled in a litigation on that particular point, and can not affect the constitutionality of the law.

Third—It is next objected that the act under discussion violated article 115 of the constitution, because the attempt is made to amend and re-enact the ninth paragraph of the ninth section of a previous act, and to add a new (21) paragraph thereto, without re-enacting the amended section at length.

Conceding this to be a well-founded objection in a proper case, it can not, under the rule above announced, be raised here, because plaintiff has no interest in having it settled.

Fourth—It is further contended that section eleven violates the uniformity and equality of taxation, because it exempts some property and persons within the limits of the parish from taxation to which others are subject, and because the Legislature can only exempt "property actually used for church, school and charitable purposes."

Municipal or political corporations within this State can exercise the power of taxation only so far as conferred by its Legislature. (8 An. 341; 9 An. 562; 13 An. 56.) "Our statute books and those of our sister States are filled with acts creating those political corporations whose powers are emanations from the legislative will, and subject to be enlarged or curtailed by that will from time to time, as the wisdom of the legislation may dictate."

The power to tax the property within and require licenses from the inhabitants of the parish of Ouachita was conferred by the Legislature, and the exercise of that power is only curtailed by the section of the law under discussion. This law does not exempt these subjects or objects from taxation; but simply limits or restricts them to the tax-

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ing power of one of the two corporations. The exempting of persons and property within the corporation of Monroe from taxation in any form by the police jury of the parish, only withdraws to that extent from the police jury a power which had been delegated to it. The police jury still must exercise the delegated power on this subject in conformity with the constitution and laws within the limits of the parish, yet subject to its legislative control; while the municipal authorities of Monroe must do the same within its limits. The Legislature conferred the power on each sub-division of the local government, and had the right to withdraw or modify that delegation as to each or both.

Fifth—Is the law retroactive in the meaning of article 110 of the Constitution?

It proposes to exempt the property and persons from parish tax and license from and after the first day of January, 1873; it was not promulgated, as admitted by the defendant, until April 13, 1873, after the passage of the ordinance by the police jury (February 17, 1873) imposing the license claimed; and it may be admitted, for the purposes of this question, that promulgation is essential to the passage of the act. But if the doctrine above stated be correct, it simply withdrew (as the Legislature could do) a delegated authority or power, which had not yet been exhausted. The language is “* * * hereby exempted from all taxes and licenses levied by the parish of Ouachita, from and after the first day of January, 1873.” The license claimed herein was levied after the first day of January, 1873, and not having been collected, came within the purview of this act when it became a law.

The doctrine is well settled that a delegated power may be withdrawn at any time, provided the rights of third persons are not thereby affected. In this case there is no third person affected; the Police Jury being the party receiving the power to be exercised under the condition or contingency of being curtailed or withdrawn. Had the law authorized the Police Jury to levy a tax or license for a period that had passed, when it became a law, it would have been retroactive and unconstitutional. But its operation, as invoked in this case, was prospective, and therefore not unconstitutional. There was no vested right in the Police Jury to the said license as to the power of the Legislature.

Sixth—It is contended, finally, that the Secretary of State transcended his functions by promulgating the act as he did.

Const., art. 68. “* * * The records of the State shall be kept and preserved in the office of the Secretary of State; he shall keep a fair register of the official acts and proceedings of the Governor, and when necessary shall attest them; * * * and shall perform such other duties as may be enjoined on him by law.”

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The constitution, in article 109, contemplates the promulgation of all laws, the mode of doing which, however, is regulated by statute. Sec. 3493, R. S. "The Secretary of State shall number all acts or resolutions of the General Assembly and keep a register thereof, and shall indorse thereon the day on which they may be filed in his office, after receiving the sanction of the Executive. Copies of all acts and resolutions shall be delivered by the Secretary of State to the State Printer in the order in which they may be filed in his office." * * *

These, it is contended, are all the provisions of the law on this subject, and that they do not authorize the Secretary of State to promulgate an act that has not received the Executive sanction, as was the case in this instance.

We think this a too restrictive interpretation of the functions of the Secretary of State; particularly when considered in connection with article 66 of the constitution, which in one clause declares that "if a bill shall not be returned by the Governor within five days after it shall have been presented to him, it shall be a law in like manner as if he had signed it; unless the General Assembly by adjournment prevent its return; in which case the said bill shall be returned on the first day of the meeting of the General Assembly after the expiration of said five days, or be a law."

The bill in question was necessarily presented to the Governor, but was published without his signature. Although not drawn up with such precision and fullness as might be done, a fair construction of section 3493, R. S., in the light of the various articles of the constitution having any reference to the subject, will afford authority in the Secretary of State to deliver to the State Printer for publication all bills in the category of this, with the statement that they became laws without the signature of the Governor. He is required to deliver all acts and resolutions to the State Printer, and the authority to indorse on them the day of the filing in his office after receiving the Executive sanction, does not necessarily exclude the authority to do the same with those which become law by virtue of the constitution without his signature. There is not in this such a *casus omissus* as implies nullity. A bill becoming a law without the Governor's signature must be promulgated as well as one with his signature, and all bills must be promulgated through the office of the Secretary of State. It may not be sacramental, under existing legislation, that he shall state, or add a note, that it became a law without the signature of the Governor, and how it so happened; but we can not say that under all the provisions of the constitution and laws on the subject, that his doing so will destroy the law or prevent a bill in such a contingency from becoming a law.

Whited, Tax Collector, v. Mrs. M. J. Lewis and Husband.

We conclude, therefore, that section 11 of act 81, in the acts of 1873, is constitutional, and applies to this case.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

Rehearing refused.

No. 389.

THE STATE OF LOUISIANA v. JOHN TURNER and ALBERT REID.

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The fact that a juror was for a moment out of the presence of the officer under whose charge he was, when it does not appear that he had any communication with any other person, does not necessarily establish the presumption of misconduct, and make it obligatory upon this court to set aside the verdict of the jury.

In the copy of the indictment served upon the prisoners in this case, the name of one of the jurors, which is "Philip Darden," appeared as "Dauden." The objection on this point was correctly overruled. It is not shown how this trifling error has prejudiced the prisoners, and this court does not see how it could have had this effect.

Where, on the prosecutrix being offered as a witness by the State, she was interrogated in chief, cross-examined by the defense, re-examined by the State, and then sought to be recross-examined by the defense;

Held—That the court properly refused this to be done, if the re-examination on the part of the State was confined to such matters as the cross-examination drew out.

A motion in arrest of judgment will not prevail, on the ground that the judge excused two persons from serving on the jury, who had been summoned as jurors, and who were not exempt under the law. This objection should have been made when the jury were being impaneled.

The erasure of the name "Albert" and the interlineation of that of "John" in the indictment is not a good ground in arrest of judgment. The accused was identified as the party who committed the crime, and whether he committed it in the name of Albert or John, matters nothing to justice. The District Attorney swears that the change in the name was made on the day the prisoner was arraigned. The court was then authorized at any time to have its records corrected, so as to make them conform to the facts.

There is nothing in the objection that some of the jurors who served on the jury do not appear on the *venire*, or list of the jurors drawn to serve for that term of the court. It should have been made before the trial was entered upon and while the jury was being impaneled. The prisoners took the chance of the jury; they must take the verdict.

The proposition urged, on the motion for a new trial, that the court refused to charge the jury, as requested, that it is necessary to prove both penetration and emission to make out the crime of rape, is monstrous.

It is the penetration which destroys the victim and constitutes the crime, and not the consummation of the violator's lust.

Technicalities which have the tendency to make the criminal laws of the country a shield, instead of a terror, to evil doers, can not be countenanced by this court.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J.* Criminal case. *Eugene McFee* and *O. Newton*, for defendants and appellants. *Dunn*, District Attorney, for the State, appellee.

MORGAN, J. The defendants having been found guilty by a jury of having committed a rape upon the person of one Mary Gray, and having been sentenced, in conformity with the verdict, to imprisonment at hard labor for the remainder of their natural lives, have appealed from the sentence which deprives them of their liberty, and

have assigned several errors in the rulings of the district judge when their case was being tried, which errors they contend entitle them to be remanded to another jury for a new trial.

They assign as error in the proceedings that the jurors who tried them were allowed to separate after they had been sworn and impaneled. It is shown that during the trial several of the jurors, one at a time, were out of the presence of their fellow jurors. But it is also shown that they were only so absent by reason of the imperative calls of nature, and that, when thus absent, they were always under the charge of the deputy sheriff. It is true that, on one of these occasions, after the jury had retired to consider their verdict, one of the jurors, accompanied by a deputy sheriff, came down stairs and went outside of the courtroom, and that the officer was called back by the judge, the juror being thus for a moment separated from the officer. We are called upon to say that this separation forces the presumption of misconduct, which entitles the defendants to a new trial. To do this we would have to impute complicity on the part of the judge, the sheriff's officer, and the juror, all combining to do some act by which the prisoners, if found guilty, would be entitled to a new trial, and thus, perhaps, escape the penalty which the law attaches to their crime, and which had been fully proved to the jury who first tried them. This we have no warrant in law for doing. We will not say that because a juror was for a moment out of the presence of the officer under whose charge he was, when it is not shown or alleged that he had any communication with any other person, and it does not appear that he had an opportunity to have had any, it necessarily establishes the presumption of misconduct, and makes it obligatory upon us to set aside the verdict. We may be willing to take the law upon this subject to be as it is laid down in *Hornsby's case*, but we can not carry it any further. We would be carrying it very much further if we set aside the verdict of this jury on this ground.

It is contended that the district judge erred in overruling the objection which was made to Philip Darden serving as a juror. In the copy of the indictment served upon the prisoners, his name, it is alleged, appeared as Dauden, but they do not show how this trifling error has prejudiced them, and we do not see how it could have done so.

Another exception was taken to the refusal of the judge to allow defendants to recross-examine the prosecutrix. She was offered as a witness on behalf of the State. She was interrogated in chief, cross-examined by the defense, and re-examined by the State. The defense then sought to recross-examine her. The court refused to allow this to be done. If the re-examination on the part of the State was confined to such matters as the cross-examination drew out, the ruling was

correct. This is a matter of fact which does not appear in the bill of exceptions or in the record, and we can not therefore notice it. We must presume, in the absence of contrary proof or allegation, that the judgment restricted the examination of the witness within the limits prescribed by the law.

Arrest of judgment was moved for on the ground that the judge had excused two persons from serving on the jury who had been summoned as jurors, and who were not exempt under the law. This objection should have been made when the jury were being impaneled. The prisoners had been served with a copy of the venire, and knew that these persons had been summoned. If they wished for their presence they should have called upon the court to have them produced. They did not do so. They can not, after letting their right, if it was a right, go by, claim the benefit of it.

They moved for arrest of judgment on the further ground that there are erasures and interlineations upon the indictments without any authority of court permitting the same.

The erasures and interlineations consist, as is alleged, in this: The indictment, as presented to the grand jury, was against Albert Turner; the warrant was made out against Albert Turner, and it was under this warrant that he was arrested. He was arraigned as Albert Turner; he was tried and condemned as John Turner. It is alleged that this change of name was discovered on the trial, and that after the motion for a new trial had been overruled, it was found that this erasure of "Albert" and the interlineation of "John" had been made, and this without any authority apparent on the face of the papers. In so far as Reid is concerned, he can not complain of this, as it does not concern him, and no arrest of judgment could be asked for him on the grounds stated. Neither can it avail Turner. He was identified as the party who committed the crime, and whether he committed it in the name of Albert or John matters nothing to justice. But the district attorney swears that the change in the name was made on the day the prisoner was arraigned. The court was then authorized at any time to have its records corrected so as to make them conform to the facts.

Again, arrest of judgment was asked, because, it is alleged, the jury impaneled to try them were not drawn from the regular panel. It is averred that Petit, Morris, Williams and Brown, who served on the jury, do not appear upon the venire or list of jurors drawn to serve for that term of the court. There is nothing in this objection. If it existed it should have been made before the trial was entered upon, and while the jury were being impaneled. They can not take advantage of such an error, if it be an error, to get jurors not on the panel who might be favorable to them, and then take advantage of the error after the verdict has been given against them. They took the chance of the jury; they must take the verdict.

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They urge that they are entitled to a new trial because the court erred in refusing to charge the jury, as requested, that it is necessary to prove both penetration and emission "to work out the crime of rape." The proposition is monstrous. It is the penetration which destroys the victim and constitutes the crime, and not the consummation of the violator's lust.

The prisoners, after a fair trial, have been found guilty of an offense which, of all others, is most shocking to the sensibilities of every man born of woman. It is not to this court that they must look for immunity from the punishment due to their crime, or for giving countenance to such technicalities as those upon which they rely for a new trial or arrest of judgment—technicalities which have the tendency to make the criminal laws of the country a shield instead of a terror to evil doers.

Judgment affirmed.

No. 394.

J. L. KALISKI, Agent, v. M. M. GRADY, Collector.

The tenth clause of section 1 of act No. 14 of the acts of 1872 is not unconstitutional, because it levies a tax of eighty-five dollars on persons dealing in distilled liquor, or retailing spirituous liquors on land, while a tax of only fifty dollars is levied on persons following a like occupation on steamboats, although they may only ply within the limits of a single parish of the State.

APPEAL from the Parish Court, parish of Ouachita. *Caldwell, J. R. J. Cobb*, for plaintiff and appellee. *A. L. Slack*, parish attorney and district attorney *pro tem.*, for defendant and appellant.

MORGAN, J. It is contended in this case that the tenth clause of section 1 of act No. 14 of the session acts of 1872 is unconstitutional because it levies a tax of eighty-five dollars on persons dealing in distilled liquor or retailing spirituous liquors on land, while a tax of only fifty dollars is levied on persons following a like occupation on steamboats, although they may only ply within the limits of a single parish of the State.

We fail to see the force of this proposition. The same amount of tax is levied upon all persons pursuing a certain traffic in a certain way, and we do not see how there can be any unjust discrimination in this.

The other objections to the tax are governed by the decision in the case of *Jones v. Grady*, just decided.

It is therefore ordered, adjudged and decreed that the judgment of the parish court be avoided, annulled and reversed; and it is further ordered that the injunction herein issued be dissolved with twenty per cent. damages and thirty dollars attorney's fees, appellees to pay costs in both courts.

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No. 317.

M. A. COPLEY, Administratrix and Tutrix, v. MRS. DORCAS DINK-
GRAVE.

It is not for this court, or any other, to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to land. But if the United States, at the moment of the adjudication, had no title to the land in question, this action of the officers of the Land Department gave the plaintiff none; and the question whether the United States had any title at the time of the adjudication, is clearly a question for the courts of justice, and not for the officers of the Land Department, to decide.

The plea of *res judicata* in this case is overruled.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellee. *Isaiah Garrett*, for defendant and appellant.

HOWE, J. This is a petitory action to recover a tract of about fifteen acres of land in possession of defendant. The plaintiffs claim under a patent issued to them by the United States on the twelfth of October, 1858.

The defendant pleaded the general issue and averred a title in herself. The parties, it seems, own adjoining plantations, and their entries lap to the extent of the land in dispute. In her answer the defendant says:

"She avers that, in the year 1851, she acquired by purchase, for a valuable consideration, an improvement on what was then considered, and what was in fact, public lands of the United States of America, and that she moved upon said land in the year 1851, with the intent to make it her home, hoping to complete her title to the same by acquiring a pre-emption, or by purchase or otherwise, from the United States; that, in 1852 or 1853, she bought from the State of Louisiana internal improvement warrant No. 773 for three hundred and twenty acres, and on or about the fifth of September, 1853, she applied to locate said warrant on said described land, at the Land Office of the United States of America at Monroe, La. She avers that this application in writing was filed in said Land Office, and that she tendered the said warrant at the same time, and deposited it in the Land Office aforesaid, to pay for said lands. She avers that the said Register of the Land Office erroneously rejected her application at the time on technical grounds, but that shortly afterwards the said Register, on her application on the twenty-ninth of November, 1854, permitted the location to be made. She avers that there were various opinions as to the period when these lands were or became subject to location with internal improvement warrants, and that out of caution and by the advice of counsel she applied to relocate said warrant on the same lands in the month of December, 1854, and on the twenty-first of January, 1856. That in 1854 and 1856 the Register stated that the location made before by

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said defendant was good and valid, and that a relocation was unnecessary. She avers that the lands were public lands of the United States, and that they had been surveyed and were subject to entry or purchase at said Land Office by internal improvement warrants at the periods when she applied to locate her warrants, to wit: on the fifth September, 1853, the twenty-ninth November, 1854, in December, 1854, and in January, 1856; that the legal and equitable right to said land dated from her first application on the fifth of September, 1853. She avers that she has been in the peaceable, lawful and actual possession of the lands claimed by plaintiffs in their petition, under a legal and just title translativ of property and legal in form since the twenty-ninth of November, 1854, and in the actual possession and occupancy of said land and as a possessor in good faith since 1851. She pleads the prescription of ten years against the plaintiff's pretensions to the land, and the prescription of one and three years against plaintiff's pretended claim for rent and damages. She further avers that the pretended claims of the plaintiff are fraudulent, without equity, and unfounded in law. She alleges that true it is that a patent for said lots eleven, twelve and thirteen has been issued to the heirs and legal representatives of George W. Copley, deceased, but she alleges that the same was illegally and erroneously issued by the United States, and that it was procured and obtained by fraud and ill practices. She avers that the pretended right of plaintiff is based on the claims or pretensions of George W. Copley to a pre-emption right to enter the land in question under an act of Congress passed on the twenty-seventh of January, 1851, entitled 'an act to grant the right of pre-emption to certain settlers on the Maison Rouge grant in the event of the final adjudication of the title in favor of the United States,' the said Copley pretending to claim by mesne conveyance from Daniel W. Coxe. She avers that George W. Copley did not purchase the land in good faith; that he did not pay a valuable consideration for said land prior to the first of March, 1849, or at any other time; that he did not improve and cultivate the land claimed. She further alleges that even if he had bought the land in good faith, and paid a valuable consideration for the same, he would not have acquired any right, title or claim thereto, and the said purchase was absolutely null and void, because said purchaser was a purchaser of a litigious right pending in a court of the State of Louisiana, in which said Copley practiced law as an attorney at the time of his purchase."

There are other averments and demands in the answer which it is not necessary to notice at this stage of the case.

The plaintiff filed to this defense a plea of *res judicata* "alleging that all the matters set up in defense (as copied above,) after the word property, in the nineteenth line, had been set up and examined by the

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Land Office Department of the United States; that the officers of said department are by law constituted the judges, and are authorized to hear and determine all contests and claims to and about the public lands of the United States; that all the matters urged by the defendants in this case were urged before the proper land officers and finally adjudicated upon and determined in favor of plaintiff, and a patent issued to the heirs and legal representatives of George W. Copley, deceased, for the land in question. The objections and defenses now made were made before the local Register and Receiver of the United States Land Office, and decided in plaintiff's favor. The defendant appealed to the Commissioner of the General Land Office, who decided in favor of plaintiff. The defendant then appealed and took her case to the Secretary of the Interior, who finally determined the controversy in favor of the plaintiff, and adjudicated the title of the United States to the land in question to the plaintiff, and caused the patent declared on to issue, that the officers aforesaid were authorized to hear and determine the matters set up in the answer after the word 'property,' aforesaid; that they did decide and determine these matters. Wherefore, she interposes the plea of *res judicata* as to all these matters."

The plea of *res judicata* was sustained by the court *a qua*, and judgment having been given in favor of plaintiff, the defendant appealed.

A phrase correctly used by plaintiffs in their plea may throw some light on the question before us: "The defendant then appealed, and took her case to the Secretary of the Interior, who finally determined the controversy in favor of the plaintiffs and adjudicated the title of the United States to the land in question to the plaintiffs, and caused the patent declared on to issue." It was the title of the United States that was adjudicated, and to that extent the adjudication was final.

It is not for this court or any other to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to land. But if the United States at the moment of the adjudication had no title to the land in question, this action of the officers of the Land Department gave the plaintiffs none. And the question whether the United States had any title at the time of the adjudication is a question for the courts of justice clearly, and not for the officers of the Land Department to decide. Taking the averments of fact in the answer of the defendant and in the plea of *res judicata* to be true, we should find that the defendant had a legal right to the land prior to that of plaintiff's and superior (9 Howard 333), and that the patent "illegally and erroneously issued by the United States" to the plaintiff, "procured by fraud and ill-practices," enured to the benefit of defendant. 13 An. 356. We can not distinguish this case from that of *Garland v. Wynn*, 20

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Howard, p. 6, except that the latter was tried on the merits, and in the case at bar we are merely assuming certain facts for the purpose of trying a peremptory exception. Wynn, in 1842, proved he had a preference of entry to the land in dispute, according to the act of 1838, and his entry was allowed. In 1843 Hemphill made proof that he had a right of pre-emption to the same land under the act of May 26, 1830. The two claims coming in conflict it was decided by the Register and Receiver at the local land office that Hemphill had the better and earlier right to enter the land, and in this decision the Commissioner of the General Land Office concurred. Wynn's entry being the oldest it was set aside, his purchase money refunded, and a patent certificate was awarded to Hemphill, who assigned it to Garland, the plaintiff in error, to whom the patent issued. Wynn filed his bill to compel Garland to convey the land to him. Garland pleaded, among other things, that the court had no authority to set aside or correct the decision of the Register and Receiver, concurred in by the Commissioner, and that their decision was final. The Supreme Court of Arkansas thought differently, and decreed that Garland should convey the land to Wynn, and the Supreme Court of the United States affirmed the decree, giving the reasons why the courts could examine and overrule the decision of the land officers in such a case, announcing this to be the settled doctrine of the court, and citing 1 Peters 212; 9 Howard 328; 14 Howard 377, and 18 Howard 44. And see also *Ludeling v. Vester*, 20 An. 433, and decisions there cited, and *Kittredge v. Breaud*, 4 Rob. 79. If there are any decisions of State courts prior to *Garland v. Wynn* which seem to announce a different doctrine they must be held to have been thereby overruled.

For the reasons given it is ordered and adjudged that the judgment appealed from be reversed, and the plea of *res judicata* overruled, and the cause remanded for further proceedings according to law, appellees to pay costs of appeal.

Rehearing refused.

Chief Justice Ludeling recused.

No. 382.

SUCCESSION OF J. D. and E. C. BAILEY.

Nothing can be assigned as an error of law which could have been cured by evidence legally given at the trial.

An assignment of errors in this Court can not cure the omission of the appellants to make opposition and present regularly the issues of fact which they desire adjudicated.

APPEAL from the Parish Court, parish of Franklin. *Duncan Bril, J. Morrison & Farmer*, for appellees. *S. D. McEnery* and *P. H. Toser*, for appellants.

WYLY, J. On the twelfth August, 1870, Allen W. Eddins, adminis-

trator of this succession, filed his final account, and prayed that it be advertised according to law, and, after due proceedings, that it be homologated; that his bond be canceled, and that he be discharged from further administration of the estate.

After this account had been duly advertised and proved (as the judge states in his judgment), and no opposition having been made, it was homologated. This was on the eighth April, 1871, eight months after it had been filed.

On the twentieth of March, 1872, nearly one year after this judgment was rendered and after Eddins, the administrator, had died, the heirs at law of the said Baileys took a devolutive appeal, alleging in their petition merely that they are aggrieved by the judgment homologating the final account.

At the last term of this Court, the death of two of the heirs was alleged, and the heirship was disputed. The case was remanded to try these questions. It is now before the Court, and the right of the appellants to contest, as heirs, is not disputed.

The appellants place their entire case upon an assignment of errors apparent on the face of the record.

The first error assigned is: that the administrator credits himself, in his account, with the appraised value of the slaves—"Richard, Eliza, Bob, Henry, Ben and Elizabeth, purchased by X. Bailey, and were not paid for, but returned to the administrator and were emancipated in his hands—\$4425."

The defendant contends that this statement in the account is not true, because, in the record, there is the proces verbal of the third March, 1860, showing that these slaves were sold to X. Bailey for said amount, cash, and that the administrator can not contradict said proces verbal. But it appears from the note of evidence that this proces verbal (although now in the transcript) was not received in evidence. We can not revise the judgment on proof neither offered nor received in evidence in the court below.

The only question under this assignment which we can consider, is, whether or not it was the duty of the administrator to have resold the slaves as soon as Bailey refused to pay the price and returned them to him. The statement that there had been a sale and the slaves had been returned are questions of fact which can not be disputed on an assignment of errors.

The legal consequence of these facts is, however, a question of law which is properly before the Court.

There is nothing in the record to show that the heirs at law ever demanded the resale of the slaves, or that it was necessary. On the contrary, as there seems to have been ample funds to pay all the debts, the administrator had no cause to sell the slaves. It was his duty to keep them for the heirs.

Even though they had been sold and returned to him, because of the inability of the purchaser to pay the price, or for any other reason, the administrator was not bound again to provoke the sale of them if he had, in the meantime, obtained from other sources funds of the estate to pay its debts. The fact that the slaves were emancipated in his hands is no reason why he should sustain the loss. There is, therefore, no force in this objection.

The next error assigned is: the administrator credits himself with \$1622 80, and adduces voucher eighteen as evidence of said credit; that said voucher does not make the required proof. This is a question of fact, a question whether this item of the account is duly proved.

If the appellants had opposed the account during the eight months it was pending before the parish court, perhaps ample proof would have been adduced to remove all objection on this point.

Each of the other errors assigned involve merely questions of facts, whether the items of the account are duly proved.

These objections should have been regularly presented by an opposition filed in the lower court. They can not be considered, under the settled jurisprudence of this State, as an assignment of errors. "Nothing can be assigned as an error of law which could have been cured by evidence legally given at the trial." *Flower v. Hagan*, 2 L. 225. "No judgment can be reversed on the mere assignment of errors which might have been cured by evidence legally introduced." *Butler v. Despatir*, 12 M. 304; 1 N. S. 59; 2 N. S. 265, 537; 2 L. 70, 225; 3 L. R. 481; 11 R. 90; 14 L. 368, 383; 1 R. 30; 12 R. 454. "Appellant can not assign anything as an error, apparent on the record, which might have been cured by legal evidence." *Hill v. Suzzine*, 1 N. S. 599; 12 M. 304.

Suppose the appellants had filed an opposition in the lower court only as to one item of the account, and being dissatisfied with the decision below, had brought the case to this Court, could they have raised objections here as to the correctness of items they had not opposed or disputed in the lower court? Surely not. The litigation would have been confined to the issue presented in the opposition. They could not have gone beyond it. In this case, they raised no controversy in the court below; they made up no issue, although duly notified of the filing of the account, and called upon to make opposition thereto, or else, after legal delays, the account would be duly homologated. They failed to raise the issues of fact at the time and in the manner provided by law and the rules of practice, and they now seek to raise them in this Court. They propose, by filing an assignment of errors, to gain all the advantages they would have had had they filed an opposition to the account.

An assignment of errors in this court can not cure the omission of

the appellants to make opposition and present regularly the issues of fact which they desire adjudicated. Besides, if the appellants could succeed in presenting the issues they desire in this irregular manner, it would be greatly to the disadvantage of their adversary, because, had they objected at the proper time, while the account was pending in the parish court, ample proof might readily have been adduced by the administrator to satisfy all their complaints, and to remove all objections. The administrator is now dead, important witnesses may also be dead, and the heirs of the administrator may find it difficult, not knowing the witnesses, or where to find the proof, to contest with the appellants upon issues which the administrator himself at the time of the homologation of his account could, perhaps, have met successfully and without much difficulty.

On the whole, we see no reason, either in law or equity, to entertain the objections raised by the appellants in this court, and we can not do so under the settled jurisprudence of this State.

It is therefore ordered that the judgment homologating the final account of the administrator, Allen W. Eddins, canceling his bond, and discharging him from further duty, be affirmed, and that appellants pay costs of appeal.

No. 375.

SUCCESSION OF E. C. HART.—Opposition to Account.

The grounds for opposing the judgment placed on the tableau, are such as should have been presented before its rendition, and can not be urged in this proceeding. If the heirs are injured by the failure of the administrators to set up those grounds, there is a remedy at the proper time and before the proper tribunal. Their prayer to amend the judgment can not be heard, because they are appellees.

The order to the administrators to pay the said judgment out of the first funds, may not be strictly regular, but it is of little importance in this instance, as the question of privilege can not arise, and no other creditor seems to be contesting.

APPEAL from the Parish Court, parish of Caddo. *Smith, J. Nutt & Leonard*, for opponent and appellee. *Egan & Wise*, for administrators and appellants.

HOWELL, J. A motion is made to dismiss this appeal on the grounds:

First—Because all parties interested in maintaining the judgment appealed from have neither been made parties to the appeal nor cited to answer. It is urged that appellants caused a curator *ad hoc* to be appointed and cited to represent several absentees, who are interested to maintain the judgment. As the succession is admitted to be entirely solvent, those parties can not be affected by any change in the judgment appealed from, and hence they are not necessary parties. There is no distribution of funds made in these proceedings.

Second—Because the record was not filed in this court within the legal delay.

It is within the recollection of the Court that an order was granted extending the time to bring up the appeal, and we can not make the appellants suffer for the omission of the clerk of this Court to do his duty and make an entry of the order. The authority cited does not apply.

Third—Because the judgment in case of Spyker *v.* Hart was rendered contradictorily with the administrators and appellants, has the effect of *res judicata*, and has been acquiesced in by them, placed on the tableau and partly paid.

The alleged payments were made prior to the appeal herein, and do not debar appellants from complaining of the terms of the judgment on the oppositions. They do not deny the verity of the judgment, but complain that they have been ordered to pay it in an illegal manner. They have not acquiesced in or partially paid the judgment from which they have appealed.

Fourth—Because neither in the court *a qua* nor in this Court is said judgment in favor of Spyker, so allowed, opposed by any person or persons, who have proved themselves to be either heirs or creditors of E. C. Hart, deceased; and because no parties but the administrators have appealed.

This refers to Cornelia Hart, who opposed the said judgment, as allowed on the account, as widow and tutrix. The objection might avail to dismiss her opposition, but not the appeal taken by the administrators.

The motion to dismiss is overruled.

ON THE MERITS.

Mrs. Spyker, as widow and administratrix, ruled the administrators of this succession to file an account and show cause why they should not pay the judgment in the case of Spyker *v.* Hart.

An account was filed, in which the said judgment, subject to certain credits, was placed among other debts unpaid. Oppositions to the account were filed by Cornelia Hart, and the administratrix of Spyker, from the judgment on which the administrators of this succession appealed.

We deem it unnecessary to notice the questions of practice and pleading which have been presented, as we see no reason for making any material change in the judgment, and the ultimate rights of the parties will not be affected, the succession being solvent and the remedies of such parties obvious.

The grounds for opposing the Spyker judgment are such as should have been urged before its rendition (13 An. 416; 14 An. 575), and

Succession of Hart.

can not be urged in this proceeding. If the heirs are injured by the failure of the administrator to set them up, there is a remedy at the proper time and before the proper tribunal. Their prayer to amend the judgment can not be heard, because they are appellees.

The order to the administrators to pay the said judgment out of the first funds may not be strictly regular, but it is of little importance in this instance, as the question of privilege can not arise, and no other creditor seems to be contesting.

Judgment affirmed.

No. 384.

JESSE T. MATTHEWS v. JAMES H. WILLIAMS.

Where there is a discrepancy between the allegation and the document made part of the petition, the latter controls.

Where promissory notes, prescribed on their face, represented the legal obligations of the defendant's father for borrowed money, and the defendant gave his own notes therefor, it was not a *nudum pactum*; there was a valid consideration. The son had the right, by natural mandate, to pay his father's debt, or to promise to pay it, and bind himself unconditionally, as he did. Let him be bound as he saw fit to bind himself.

APPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Todd and Brigham*, for plaintiff and appellee. *D. C. Morgan*, for defendant and appellant.

WYLY, J. The defendant appeals from the judgment condemning him to pay the plaintiff the amount of a promissory note for \$1003.

Our attention is called to the bill of exceptions taken by the defendant to the introduction of the note in evidence on the ground that it contradicted the allegation of the petition, saying that the note was made payable to and owned by the plaintiff, whereas on its face it showed that it was payable to J. A. Matthews. A like objection was made to the testimony of J. A. Matthews, showing that he was the payee of the note.

There is no force in this exception. These objections were frivolous. It is true there was an averment in the petition that the note was made payable to and owned by the petitioner, but the note was made part of the petition, and it showed that it was payable to J. A. Matthews or bearer. Where there is a discrepancy between the allegation and the document made part of the petition, the latter controls. Besides, this mistake in the pleading was corrected by a supplemental petition.

The defendant contends that he gave the note sued on in lieu of two notes made by his father; that this was an attempt at a novation of the two old notes by the substitution of a new debtor, without the knowledge of the former debtor, who was absent at the time; that this was a *nudum pactum*, there being no consideration, the old notes being prescribed. The old notes represented the legal obligations of

Matthews v. Williams.

the father of the defendant for borrowed money; no plea of prescription had been opposed to them, although on their face they appeared to be five years past due. We think they were a valid consideration for the note given by the defendant. He had the right, by natural mandate, to pay his father's debt; he had the right to promise to pay it; he had the right to bind himself, as he did, unconditionally to do so. No fraud was practiced upon him; the face of the note showed that it was five years past due. Yet he was willing, and promised unconditionally, to pay it. As he saw fit to bind himself let him be bound.

Judgment affirmed.

No. 394.

J. M. JONES v. M. M. GRADY, Tax Collector. B. L. SIMS v. the same.
(Consolidated.)

When the ordinance of the police jury which is complained of in this case was passed, the revenue law of 1871 was in force, even if such authorization was necessary. The tax imposed by the ordinance was authorized by that law, and having been levied under it, it can not be held that the action of the police jury was illegal.

Police juries are not restricted in their action in regard to licenses exacted by them for the right of selling liquor and retailing spirituous liquors to the amount exacted by the State for the same.

Section 2778 Revised Statutes, means that whenever the police jury deems it necessary that the sense of the people should be taken as to the propriety of permitting grog shops to be licensed, a vote may be ordered. But when this shall be deemed necessary, is a matter entirely within the discretion of the police jury.

A PPEAL from the Parish Court, parish of Ouachita. *Caldwell, J. W. J. Q. Baker* and *R. G. Cobb*, for plaintiffs and appellees. *A. S. Slack*, parish attorney and district attorney *pro tempore*, for defendant and appellant.

MORGAN, J. These cases are consolidated. They present the same questions for determination. Plaintiffs enjoined the tax collector from selling their property which had been seized in order to compel the payment of two hundred dollars license exacted from them by a parish ordinance for the right of selling liquor and retailing spirituous liquors. They contend that the tax which is sought to be collected from them is illegal, unconstitutional, oppressive and void, because—

First—That the police jury had no authority to levy any tax or license when they attempted so to do, and that their action was illegal.

Second—That the police juries are restricted in their action to the amount exacted by the State.

Third—That the State had not acted at all when the ordinance in question was passed.

Fourth—That the amount levied by the police jury exceeds the amount exacted by the State.

Fifth—That no license can be levied by the police jury or State until the vote of the people is taken on the subject and their consent obtained, and that the vote of the people has never been taken.

Sixth—That the tax is unconstitutional in not being equal and uniform on all the occupations taxed, and especially is it not uniform in relation to retailers of spirituous liquors, keepers of grog shops, bar rooms, etc.

I. When the ordinance of the police jury, which is complained of, was passed the revenue act of 1871 was in force. The tax was authorized, even if such authorization was necessary, by that law, and having been levied under it, it can not be held that the action of the jury was illegal.

II. Police juries have the right to regulate the police of shops where liquors are retailed, and to impose such tax as they may see fit on grog shops, etc. (R. S. 2745, § 6.) Their power is exclusive to make such laws and regulations for the sale, or for prohibiting the sale, of intoxicating liquors as they may deem advisable. (R. S. 2778.) And it is made the duty of the police jury to adopt such regulations as may be necessary for the purpose of carrying out this law. (R. S. 2780.) It follows, therefore, that the police jury was not restricted in their action to the amount of that exacted by the State.

III. This objection is answered by what we have said in relation to the first.

IV. Section 2778, Revised Statutes, provides that police juries shall have the right to grant or withhold licenses from drinking houses and shops within the limits of any city, ward of a parish, or town, as the majority of the legal voters of any city or ward may determine by ballot, and the said ballot shall be taken whenever deemed necessary by the police juries. But we do not understand that this means, as seems to be contended by the appellees, that before a license is issued by a police jury to a person to keep a grog shop, a vote of the citizens of the ward in which a shop is proposed to be opened, should be taken. We understand it simply to mean that whenever the police jury deems it necessary that the sense of the people should be taken as to the propriety of permitting grog shops to be licensed, a vote may be ordered. But when this shall be deemed necessary is a matter entirely within the discretion of the police jury.

V. We fail to discover where the inequality in the amounts required for the licenses to carry on the particular business in which plaintiffs are engaged lies. Every person carrying on the same business is charged the same sum for the privilege of doing so, and this places them all upon an equality.

In conclusion we fail to see any good reason why these injunctions should have issued, and we think they should be dissolved, with the damages claimed.

Jones v. Grady, Tax Collector. Sims v. same.

It is therefore ordered, adjudged and decreed that the judgments in both these consolidated cases be avoided, annulled and reversed, and it is further ordered, adjudged and decreed that the injunctions issued in both cases be dissolved with twenty per cent. damages and thirty dollars counsel fees in each case. Appellees to pay the costs in both courts.

No. 402.

JOHN W. WILLIS v. JOHN W. WANSLEY.

A party has no right to demand the nullity of a judgment rendered against him, because the attorney who acted on his behalf was without authority, after permitting that attorney to continue the litigation, and after taking the chances of a favorable judgment in this court.

APPEAL from the Twelfth Judicial District Court, parish of Franklin. *Crawford, J. Drake & Garrett*, for plaintiff and appellant. *H. P. Wells*, for defendant and appellee.

WYLY, J. The plaintiff sues to annul a judgment which the defendant obtained against him in September, 1870, on the ground of fraud and ill-practices by said defendant and his attorney, H. P. Wells.

The allegations, in substance, are: That Wansley sued Willis on a promissory note for \$880 and interest; that Wansley allowed the suit to rest from term to term, his counsel (Wells) assuring Willis that the claim was extinguished by prescription, and that it was entirely unnecessary for Willis to employ counsel to defend the suit; that after he had thus lulled Willis into a feeling of perfect security that his case would either be abandoned or not prosecuted, he waited patiently until a judicial day of the district court should arrive, when Willis would be absent; that at last this auspicious moment arrived, in September, 1870, when this counsel of Wansley induced Colonel C. H. Morrison, upon the specious assurance that it was for Willis' benefit, to appear without any lawful authority as an attorney, and file for him the plea of prescription, which he declared to Morrison would dismiss the case; that Morrison fell into the trap so ingeniously set for him, filed the plea of prescription, when Wansley (whose presence or proximity was unknown to Morrison) suddenly made his appearance on the stand as a witness, and falsely swore that the claim had been taken out of prescription by the acknowledgment of Willis in 1863.

The answer is a general denial.

The court gave judgment for the defendant, and the plaintiff appealed.

In the suit which resulted in the judgment sought to be annulled, there was an answer filed for Willis, by his counsel, Farrar & Reeves, in which the general issue and the plea of usury were set up. These attorneys, however, were not present at the trial.

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C. H. Morrison testifies that "when the case was called for trial, Captain Wells appeared for the plaintiff. No one appeared for the defendant. Captain Wells turned to me and asked me if I was not going to represent the defendant Willis. I told him no; that I had nothing to do with the case, had never been spoken to by Willis in relation to it. He then urged me to take up the case and attend to it for Willis, saying that I was attorney for Willis in most of his cases; that the counsel who were defending his suit were absent, and that he, Wells, was tired of the case and wished to have it disposed of; that there was nothing in it, and that Willis' defense was prescription, and that defense was good. I requested him to let the case stand over, that Mr. Willis was absent, but would be at home in a few days and before the court would adjourn, expressing at the same time a disinclination to do anything with the case, unauthorized as I was. * * * Captain Wells assured me there was nothing to be done in the case but to file the plea of prescription, which was good and must prevail, saying that he was tired of the case and wished to dispose of it. * * * Wells also told me that Willis told him he intended to plead prescription; and not doubting from what Wells told me that the plea was good and must prevail, I asked the court for time to prepare the plea, which I did, and filed it. The case was taken up immediately, when Captain Wells introduced the plaintiff, Wansley, as a witness, who testified, as will be seen by the evidence in the case. When I consented to file the plea of prescription, as above stated, I was not aware that the plaintiff, Wansley, was present, and did not believe from what Captain Wells had told me that an attempt would be made to make any proof to take the note out of prescription. The defendant, Willis, was not present."

This witness also testifies that he was not employed by Willis, and in explanation of his course he says: "After I found that judgment was rendered against the defendant I made an effort to obtain a new trial, but was disappointed. I then asked for and obtained an order for an appeal, and subsequently attended to the case in the Supreme Court."

Willis and Wells both gave evidence in the case, and their testimony conflicts as to the conversations which they had previous to the trial, and which Willis contends misled him and lulled him into security.

The judgment complained of was rendered in September, 1870, and the suit had been pending since August, 1866, four years.

On the seventeenth September, 1870, the day the judgment was signed, Willis arrived and was informed by Colonel Morrison that judgment had been rendered against him and the case was pending on an application for a new trial, which he hoped to get.

Willis, who knew all the facts of the case, as he testifies, in a short

time after the judgment was rendered, does not appear to have repudiated the acts of Morrison, who, as we have seen, appeared as counsel for him without being employed; on the contrary, he permitted Morrison to continue the litigation of the case until it was finally decided in the Supreme Court in July, 1871, nearly one year thereafter.

It was the duty of the plaintiff, for whom Morrison appeared as counsel without authority, to have repudiated his acts as soon as informed thereof. The fact that he permitted him knowingly to continue the litigation for nearly a year thereafter, until the final disposition of the case in this court, satisfies us of his ratification of the acts of Morrison in his behalf.

He had no right to demand the nullity of the judgment because the attorney who acted for him was without authority, after permitting that attorney to continue the litigation, and after taking the chances of a favorable judgment in this court. If the judgment of this court had been in his favor, it is quite evident that no objection would have been made, because if he did not rely on the defense made for him by Morrison, he would not have permitted him to take the appeal and continue the litigation. If dissatisfied, he would not have permitted the unauthorized defense to continue; he would have demanded the nullity of the judgment on the ground that the attorney had no authority to represent him.

We are constrained, however, to say that the conduct of H. P. Wells, attorney at law, in this matter is not approved by the court.

Judgment affirmed.

No. 426.

C. B. CONNELL *v.* ALLEN MEDDOCK.

25 590
50 1080

The formalities required by law in attachment suits must be strictly observed—the posting of copies of the attachment and citation so as to give notice to the public, and the door of the courtroom is mentioned as the place.

But the construction of a courthouse may be such as to make the posting at the entrance leading to the door of the courtroom a legal posting. The objection raised in this case is too technical.

APPEAL from the Tenth Judicial District Court, parish of De Soto. *Levisse, J. Elam & Wemple*, for plaintiff. *H. G. Hall*, for defendant and appellant.

HOWELL, J. This is an attachment suit, which was instituted in November, 1871, and on appeal to this court in July, 1872, the judgment in favor of plaintiff was reversed on the ground that the writ of attachment was not posted as required by law, and the cause remanded “to make service of citation according to law and for new trial.” 24 An. 512.

Upon the new trial the sheriff was permitted to amend his return on.

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the writ of attachment so as to read: "Served the same by affixing a copy of the within writ of attachment on the door of the room where the court in which this suit is pending is held."

Evidence was introduced to show that the posting was on a movable bulletin board standing at one of the main entrances to the stairs leading from the hall or passage on the ground floor of the courthouse to the courtroom on the second floor, where all such notices are posted, and was not posted on the door of said room.

It is contended that this is not in compliance with the law. The formalities required by law in such proceedings must be strictly observed. The formality in this respect is the posting of copies of the attachment and citation so as to give notice to the public, and the door of the courtroom is mentioned as the place. But we think the construction of a courthouse may be such as to make the posting at the entrance leading to the door of the courtroom, as was done in this instance, a legal posting. It is shown that this bulletin board was provided some time before this suit, and has always since been used for the posting of all notices by the sheriff. We must consider the objection in this case too technical.

Judgment affirmed.

Rehearing refused.

 No. 398.

FLOURNOY & MILLSAPS v. M. M. GRADY, Tax Collector.

Retail dealers are those who keep an open shop and who sell provisions and liquors in small quantities. C. C. 3208.

A wholesale dealer is a person who sells by packages. A man may be both a wholesale and retail dealer.

He is a wholesale dealer when he sells parcels of goods in packages, as, for instance, ten barrels of flour or whisky, or whisky and flour by the barrel, or one or more sacks of coffee, or bolts of goods, at the same time, and to the same party.

He is a retail dealer when he sells flour by the pound, whisky by the gallon or bottle, dry goods by the yard.

He is both a wholesale and retail dealer when he sells all such articles by the package or by the pound indifferently.

A PPEAL from the Parish Court, parish of Ouachita. *Caldwell, J. R. G. Cobb*, for plaintiffs and appellants. *A. L. Slack*, for defendant and appellee.

MORGAN, J. It is admitted that plaintiffs are commercial partners, and that each of them is responsible for his own license; that they have only one place of business, and only one store where their business is carried on; that they sell goods, merchandise and groceries, in all quantities, from a parcel or a package up to any quantity to suit purchasers; that they sell one pound of flour or ten barrels of the same, one yard of calico or ten bolts of the same, as occasion offers;

that they break packages received by them and sell the same at retail; that they do the ordinary business in the country, and are not importers or jobbers, and that they do not sell by sample.

Under this admitted state of facts, the legal question to be determined is: Are they to pay for the license of wholesale dealers? Or are they to pay the license of retail dealers? If the former, they will have to pay one hundred dollars each. If the latter, they are to pay only fifteen.

Retail dealers are those who keep an open shop, and who sell provisions and liquors in small quantities. C. C. 3208.

A wholesale dealer we understand to be a person who sells by packages.

In our opinion, a man may be both a wholesale and retail dealer. He is a wholesale dealer when he sells parcels of goods in packages: as, for instance, ten barrels of flour or whisky, or whisky and flour by the barrel, or one or more sacks of coffee, or bolts of goods, at the same time, and to the same party. He is a retail dealer when he sells flour by the pound, whisky by the gallon or bottle, dry goods by the yard. He is both a wholesale and retail dealer when he sells all such articles by the package or by the pound indifferently. And as this is what these plaintiffs do, as they confessedly sell by wholesale as well as retail, they must pay for a wholesale license.

Judgment affirmed.

Rehearing refused.

No. 380.

JOHN C. MORTON v. JAMES G. COPELAND.

Where the plaintiff brought suit in his own name on a promissory note drawn payable to his wife or bearer, and which was executed by defendant for the price of certain lands purchased by him from the wife, the same being her paraphernal property, and where it was contended on the part of the defendant that the facts in the case showed that the plaintiff did not have the administration of the wife's property; and it was contended, on the other part, that this was not a real action, and that by article 107 of the Code of Practice the plaintiff in this case had the right to sue for the debt due his wife;

Held—That the ground assumed by plaintiff is correct, and that the fact that the husband brought the suit would seem to imply that he was administering the wife's paraphernal property.

The defense set up that there is defect in the title to the land forming the consideration of the note sued upon can not be admitted, inasmuch as defendant does not allege in his answer, or show by testimony, that he has ever been threatened with eviction, or that he has ever been disturbed in his possession.

APPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Trimble, J. Egan & Hayes*, for plaintiff and appellee. *J. & J. W. Young*, for defendant and appellant.

TALIAFERRO, J. The plaintiff brings this suit in his own name on a promissory note drawn payable to his wife or bearer, and which was

executed by defendant for the price of certain lands purchased by him from the wife, the same being her paraphernal property. The plaintiff's right to institute this action was excepted to on the ground that the law does not confer upon the husband the personal actions of the wife growing out of her paraphernal property, unless he has the sole administration of her property, and article 107 of the Code of Practice is referred to, and in connection with it the case of *Dugat v. Markham*, 2 La. 29, and that of *Cowand v. Pully*, 9 An. p. 12. It is contended on the part of the defendant that the facts in this case show that the plaintiff did not have the administration of the wife's paraphernal property.

On the other hand, it is held that this is not a real action, and that by article 107 of the Code of Practice the plaintiff in this case has the right to sue for the debt due the wife.

We think the ground assumed by the plaintiff correct. The fact that the husband brought the suit would seem to imply that he was administering the wife's paraphernal property.

The defendant sets up defect in the title to the land forming the consideration of the note sued upon, yet he does not allege in his answer, or show by testimony, that he has ever been threatened with eviction or that he has ever been disturbed in his possession. He states in his own testimony, on cross-examination, that no one has brought suit against him for the property.

The judgment of the lower court was in favor of the plaintiff, and we see no reason to alter it.

It is therefore ordered that the judgment of the district court be affirmed with costs.

No. 354.

A. D. BATTLE v. W. JENKINS.

Upon the question of the nature of the evidence necessary to prove a planting partnership, presented in defendant's bill of exceptions in this suit, the court knows of no law which requires the proof to be in writing.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Levisse, J. Nutt & Leonard*, for plaintiff and appellee. *Land & Taylor*, for defendant and appellant.

HOWELL, J. This is a suit for the settlement of a planting partnership, shown to have existed between plaintiff and defendant during the year 1867, and to establish a privilege on the crop in favor of Gilmer & Hopkins, the commission merchants of the plaintiff, for a debt contracted by the latter. The defendant has appealed from a judgment in favor of plaintiff, for the use of Gilmer & Hopkins and against the defendant, for \$594 37, with legal interest from the first January, 1868,

in full settlement of the planting partnership and of their personal accounts to first January, 1868, and sustaining the sequestration taken out by plaintiff, with all costs. The plaintiff asks that the judgment be increased to \$841 01.

The principle on which the partnership accounts should be adjusted, when no different agreement is shown, is, that each should share equally in the profits and losses, and each should contribute equally to the payment of the expenses. If one has paid more than the other, the one who has paid less owes to the other the sum necessary to make the payments equal.

In this case the items and amounts of the expenses are somewhat unsatisfactory, as presented in the evidence, but we will adopt the figures of the plaintiff's counsel, but not their mode of adjustment.

The value of the crop is.....	\$3,854 23
The amount of the expenditures is.....	3,540 60

Amount of profits to be divided.....	\$313 63
The share of each is the half, \$156 81½.	

The whole crop being in the hands of the defendant, he must account to the plaintiff for the one-half of the profits (\$156 81½), but it appears that the defendant paid \$2749 55 of the expenses, while he was bound for only the one-half, to wit: \$1770 30 (one-half of \$3540 60, as above). The difference is \$979 25, which the plaintiff must make up, and which added to the amount paid or furnished by the plaintiff, to wit, \$791 05, makes \$1770 30, the half of the whole expenses. From this sum of \$979 25, due by plaintiff to the defendant on account of the expenses, the share of plaintiff in the profits (\$156 81½) must be deducted, which leaves \$722 43½ due by plaintiff to defendant. On the theory on which the foregoing calculation is based, we do not allow the charge for the board and lodging of plaintiff and his wife. They furnished their own room, and the nature of the items of expenses indicates that the table was probably supplied at the common expense.

But the account of plaintiff against defendant for \$296 65, which is proven to be correct, seems to be entirely distinct from the partnership affairs, and should, under the pleadings and evidence, be allowed to plaintiff. This leaves the plaintiff's indebtedness to defendant on a general settlement to be \$435 78½. We will add that the other items in defendant's account against plaintiff, besides the board, are accounted for or explained by the latter.

Upon the question of the nature of the evidence necessary to prove a planting partnership, presented in defendant's bill of exceptions, we will remark that we know of no law which requires the proof to be in writing. There is in it no partnership in the ownership of real estate,

 Battle v. Jenkins.

or in the usufruct or use of real estate, in the sense contended for by defendant's counsel.

It is therefore ordered that the judgment appealed from be reversed, and that the defendant recover of plaintiff \$435 78 $\frac{1}{2}$, with legal interest from first of January, 1868, in full settlement of their partnership and personal accounts for the year 1867, and costs in both courts.

 ON REHEARING.

HOWELL, J. Upon a re-examination of this case, we think we erred both in the "figures" and the "mode of adjustment" adopted by us in our former opinion, and we now adopt the calculation and conclusion of the district judge, who gave the facts a thorough analysis, and whose decree has done justice to the parties as nearly as can be under the circumstances presented in the record. He found that the expenditures exceeded the value of the crop, and made the defendant, who had in his possession the crop or its proceeds, account to plaintiff for a sum proportionate to the amount contributed by the latter, embracing in the settlement the personal accounts of the two partners. In their brief the plaintiff's counsel say the judgment of the court *a qua* is erroneous only in not allowing plaintiff enough. We think it allows as much as he is entitled to in the most favorable view. But we can not, under the unsatisfactory evidence, reduce the amount or give judgment in favor of defendant, who has retained the crop.

It is therefore ordered that our former decree be set aside, and that the judgment appealed from be affirmed with costs.

 No. 396.

Mrs. M. J. PUCKETT and HUSBAND v. W. INGRAM LAW. E. NALLE,
Warrantor.

It was clearly the purpose of the Legislature, by the act of 1840, enlarging the powers of commissioners for the State residing in other States, to confer upon them the usual powers and functions belonging to notaries by the laws of this State.

Written acts which, by intendment of law, are clothed with solemnities in their execution, in order that they may become enduring records of past events, more surely to be relied upon than the frail memory of men, should not hastily be disregarded even upon the positive evidence of a single witness of their falsity, when such evidence is isolated, unsupported by facts *aliunde*, and given by the witness in his own behalf under strong influences of self-interest.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. Ray, J. Todd & Brigham, for plaintiffs and appellants. R. G. Cobb, for warrantor and appellee.

TALIAFERRO, J. In this case, a married woman having obtained a judgment against her husband for paraphernal claims, institutes a

Mrs. M. J. Puckett and Husband v. Law.

hypothecary action to enforce the same against lands formerly owned by her husband, which are now owned by and in possession of third parties. To the plaintiff's suit, Nalle, the principal defendant, answered, denying that the wife ever had any just claims against her husband to entitle her to a mortgage on his property, and avers that if, by law, there ever existed a legal mortgage in her favor on the lands now owned by defendant, she formally renounced the same in a notarial act passed before John D. Elliot, a commissioner of the State of Louisiana for the State of Mississippi, on the fourteenth of June, 1860.

In an amended petition, the plaintiff alleges that the pretended renunciation of her rights, set up by the defendant, is null and void, alleging as nullities:

First—That the so-called commissioner was wholly unauthorized to receive or pass any act of renunciation, not being clothed by the laws of the State of Louisiana, then in existence, with authority to execute such acts.

Second—That she signed the writing called a renunciation in error of law and of fact; that she was not apprised or informed by the pretended commissioner, nor by any other person of the nature, character and extent of her rights on the said property of her husband, and was in entire ignorance of the character of the writing she signed; that she was not examined out of the presence or even in the presence of her husband, and an explanation of her rights given and her consent obtained to a renunciation of these rights according to the laws of the State of Louisiana; that she was induced to sign the act from the effect and constraint of marital influence exercised over her by her husband at the time and before she signed the act.

Third—That the pretended renunciation was procured by Edward Nalle fraudulently, through his promise to furnish her husband \$3300 to enter lands with—an agreement which he never fulfilled.

The plaintiff pleads the prescription of one year against the attack made by the defendant upon her judgment, alleging the same to have been obtained on the first of June, 1871, nearly two years before the filing of defendant's answer, in which she sets up the nullity of her judgment. In this amended petition the plaintiff goes on to state the origin of her parapernal rights, about the validity of which there was much controversy, and much evidence taken. We have thought proper to narrow down this controversy to the consideration of the first two points made by the plaintiff, viz:

I. The authority or right of the commissioner to receive or pass acts of renunciation by married women.

II. Whether the renunciation taken by the commissioner is valid in law.

We think it was clearly the purpose of the Legislature, by the act

of 1840, enlarging the powers of commissioners for the State residing in other States, to confer upon them the usual powers and functions belonging to notaries by the laws of this State. Among these is the power to take renunciations of married women of their rights on property sold or mortgaged by their husbands. By the first section of the act of twenty-fourth March, 1840, commissioners are "authorized and empowered to take the acknowledgment and proof of any deed, mortgage or conveyance of any lands, tenements, slaves or real property lying and being in the State of Louisiana, and to take the acknowledgment and proof of the execution of any instrument of writing for the sale, transfer or assignment of any property, movable or immovable, and of rights and debts," etc. If the terms here used do not directly and expressly confer upon commissioners the power to take the renunciation of married women of their rights on property, they would seem from their general scope clearly to imply that power. A different construction would, it is obvious, render nugatory to a considerable extent the benefits and facilities to business transactions which were the primary objects of the act.

The renunciation of the plaintiff in the case before the court was made on the fourteenth of June, 1860. She brought suit against her husband in 1871, and on the first of June of that year recovered judgment against him for the sum of \$7857 97, with eight per cent. interest thereon from the third of April, 1857, with recognition of legal mortgage to date, and take effect from that time, and she is in this suit endeavoring to enforce that mortgage which she formally renounced before the commissioner in Mississippi nearly eleven years before. But this renunciation, as we have already seen, she repudiates as having been obtained unduly through the marital influence of her husband and the fraud of the defendant.

The act of renunciation upon its face is in every respect full and complete. It recites that all the requisites of the law necessary to the validity of such acts have been complied with, giving in detail all the formalities used in receiving the renunciation, and announcing the declaration of the wife that she executed the act voluntarily, after being fully informed of the nature and effect of the renunciation. The act is signed by the wife, together with her husband, before the commissioner and in presence of two witnesses. The act bears the official signature of the commissioner, with his seal of office. The act must *prima facie* be regarded as authentic, and all the acts and declarations of the parties to it, we must assume, were done, made and acknowledged as detailed by the commissioner.

There is nothing in the record, except the testimony of the plaintiff herself, that impugns the verity of the act, or tends to show that its recitals are untrue. There are no circumstances which support her

Mrs. M. J. Puckett and Husband v. Law.

testimony. On the contrary, there seems to be some which go to weaken it. She testifies wholly in her own interest, and that interest doubtless a very strong one. Neither the commissioner himself, nor either of the attesting witnesses, nor any one else, has been called to testify on the subject. Her delay of ten or twelve years to have the alleged violation of her rights redressed is unexplained. Her memory of events that transpired in 1860, after the exciting events that have intervened in this country, may not, as to all matters relating to the act passed before the commissioner, be perfect and distinct. Written acts which by intendment of law are clothed with solemnities in their execution, in order that they may become enduring records of past events, more surely to be relied upon than the frail memory of men, should not hastily be disregarded, even upon the positive evidence of a single witness of their falsity; when such evidence is isolated, unsupported by facts *aliunde*, and given by the witness in his own behalf, under strong influences of self-interest.

We therefore conclude that the judgment of the court rejecting the plaintiffs' demand was properly rendered. Considering that the wife's rights, if she ever had any on the property she seeks to enforce her claims upon, were renounced by the act of fourteenth of June, 1860, before the commissioner, it becomes unnecessary to review the other issues made by the parties in this case.

It is therefore ordered that the judgment of the district court be affirmed with costs.

No. 376.

JOHN H. WISNER'S CURATOR v. THE MAYOR AND CITY COUNCIL OF MONROE.

A political corporation can not make a contract in violation of the law of its incorporation. Under a title purporting to amend only the first section of a statute, it is not competent to amend other sections of said act. Such amendments not being covered by the title, are null and void, because made in violation of article 114 of the constitution.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. Morrison & Farmer*, for plaintiff and appellant. *R. G. Cobb*, for defendant and appellee.

WYLY, J. The plaintiff alleges that in 1868 the defendants employed John H. Wisner, then sheriff of the parish of Ouachita, to execute all the duties which it was previously the duty of the town constable to perform, and they fixed his salary at one thousand dollars per annum; that this contract or ordinance was adopted by the defendants pursuant to section 4 of act 94 of the acts of 1868, amending act 76 of the acts of 1866; also that they employed him by an ordinance to take care of a fire engine, at a salary of one hundred and fifty dollars per annum; that on these two contracts the defendants owe a balance of five hundred and seventy-five dollars, for which judgment is prayed.

Wisner's Curator v. The Mayor and City Council of Monroe.

The court rejected the demand of the plaintiff, and he has appealed.

There is no controversy as to the existence of these contracts and as to the performance of the services; but the question is, had the defendants authority thus to contract?

The act of 1866 provides for the election of a town constable, whose term of office shall be for two years; that in case of resignation or death, the vacancy to be filled by election, after ten days' notice; that in case of sickness, a constable *pro tem.* to be appointed; and that the duties of this officer, among others, shall be, to "execute all summons, orders, warrants, judgments, and decree of the justice of the peace of the town."

In 1868 the statute was amended, the office of town constable was abolished, and the duties thereof were directed to be performed by the constable of the ward in which Monroe is situated, or by the sheriff and his deputies. It appears, however, that this part of the act is violative of article 114 of the Constitution—it is not covered by the title, and it is void.

The title of the act of 1868 is "an act to amend the first section of an act to incorporate the town of Monroe, in the parish of Ouachita, and to provide for the government of the same, approved eighth of March, 1866." The first section of the act to be amended relates only to the geographical limits of the town. Under the title, therefore, purporting to amend only the first section of the statute of 1866, it was not competent to amend other sections of said act, to abolish the office of town constable and transfer the duties thereof to the sheriff and his deputies. Without this provision of the act of 1868, the defendants could not employ John H. Wisner, because the act of 1866 remained in full force, designating the duties in question to be performed by the town constable.

A political corporation can not make a contract in violation of the law of their incorporation.

There are other questions, but they are not of a serious character.

Judgment affirmed.

No. 403.

GERSPACH & HERRING v. W. H. H. MULLIN.

The assignment of error, upon which a reversal of the judgment is asked, that parol evidence was introduced to prove a promise to pay eight per cent. interest, is a ground to amend the judgment.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Ray, J. R. G. Cobb*, for plaintiff and appellees. *J. T. Strother*, for defendant and appellant.

MORGAN, J. The first assignment of error is that parol evidence

Gerspach & Herring v. Mullin.

was introduced by the plaintiffs which contradicts the deed introduced by themselves.

We find that the evidence was introduced to explain how the cash payment was made, and not to contradict the deed. The evidence was therefore properly admitted.

The second error assigned is that parol evidence was introduced to prove the promise to pay the debt of a third person, which is in contravention of the prohibitory provisions of the code.

But we do not find any promise to pay the debt of a third person. There was then no reason why the testimony should not have been received.

The last assignment of error upon which a reversal of the judgment is asked, is that parol evidence was introduced to prove a promise to pay eight per cent. interest. This is a ground to amend the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be amended by reducing the interest therein allowed from eight to five per cent., and that, as thus amended, it be affirmed. The costs of the lower court to be borne by the defendant; those of this court by the appellee.

No. 378.

**J. A. WILLARD v. W. D. BRIGHAM. WOODRUFF NORSWORTHY et als.,
Third Opponents.**

Under the statutory provisions of the United States, the property of a bankrupt may be sold free of incumbrances by order of the bankrupt court.

But to sell property free of incumbrances, the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts that justify the application, so that the judge may decide whether it shall be granted, and the secured creditor must be properly notified and summoned to appear and protect his interests. Otherwise, being the holder of a prior mortgage and not being a party to the proceedings, he would not have his rights affected thereby, and his hypothecary action, as in this case, would interrupt prescription, where notices were served upon the third possessor under the act of sale by the assignee.

The property having passed out of the jurisdiction of the bankrupt court, it was useless to cite the assignee in a proceeding against the hypothecated property, because he had no interest therein; and it was also useless to cite the discharged bankrupt (the obligor), because he was no longer bound for the debt.

A PPEAL from the Fourteenth Judicial District Court, parish of Morehouse. *Ray, J. Dunn, Newton & Hale*, for plaintiff. *J. & S. D. McEnery*, for defendant. *Richardson & McEnery*, for third opponents.

WYLY, J. In 1866 William D. Brigham bought from W. A. Parks one undivided third of the plantation known as the Parks' place, and to secure the notes given for the price, he gave a special mortgage with vendor's privilege on the property purchased. These notes were afterward transferred to the third opponent, Woodruff Norsworthy.

Willard v. Brigham.

Brigham went into bankruptcy, and in 1869, Norton, his assignee, sold the land at bankrupt sale, free of all incumbrances. The plaintiff, James A. Willard, bought it, with some two thousand five hundred acres of other lands, for the price of \$1600; and in a few days thereafter, sold the same to W. D. Brigham, the discharged bankrupt, for \$4500, on credit, taking notes, secured by mortgage on the land. Brigham failed to pay these notes, and Willard foreclosed the mortgage, and proceeded to sell the hypothecated property, when Norsworthy, who had caused his mortgage to be rendered executory, filed a third opposition, claiming the proceeds. And this is the controversy now before the court.

The plaintiff, the purchaser at bankrupt sale, claims the funds because of his special mortgage and vendor's privilege, resulting from his sale to Brigham. Norsworthy claims the proceeds of the sale because of the prior special mortgage and vendor's privilege, securing the debt of Brigham to Parks, which, as before said, was transferred to him. Norsworthy held the first mortgage and vendor's privilege on the undivided third of the Parks place when Brigham surrendered it in bankruptcy. He never proved his claim against Brigham, nor did he make any appearance in the bankrupt proceedings. Willard claims, however, that this mortgage was extinguished by the sale of the property in bankruptcy, sold by order of the court free of incumbrances, and by the cancellation of this mortgage on the records of Morehouse parish, by order of the United States District Court sitting in bankruptcy. The important questions are :

First—Whether the United States Court sitting in bankruptcy had authority, under the bankrupt law of second of March, 1867, to order the sale of the property in question free of prior incumbrances ?

Second—If the court had the authority, have the requirements of law been observed so as to remove the special mortgage and vendor's privilege set up by Woodruff Norsworthy, the third opponent in this case ?

On the first point we find no difficulty. The provisions of the bankrupt act of 1841 were similar in this respect to the one now in force, and the Supreme Court of the United States have frequently held that the property of a bankrupt may be sold free of incumbrances by order of the bankrupt court. And the same has been decided by this court. 5 R. 27, 49; 6 R. 159; 3 Howard, 296, 426; 6 Howard, 486.

In order, however, to sell property free of incumbrances, the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts that justify the order, that the judge may decide whether the application should be granted. "As this proceeding specially affects the rights of the secured creditor, he must be properly notified and summoned to appear and protect his interests. This is

Willard v. Brigham.

done by passing an order to show cause, and directing that a copy of such order and of the petition be served upon him." Bump on Bankruptcy, sixth edition, p. 151, and authorities there cited.

In the case before us we do not find that Norsworthy was properly notified, or was legally made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage. Not being a party to the proceedings, his rights are unaffected thereby.

There is no force in the objection that the hypothecary proceedings of Norsworthy did not interrupt the prescription of the notes. Notices of the proceeding were served upon the third possessor. The property had passed out of the jurisdiction of the bankrupt court; therefore it was useless to cite the assignee in a proceeding against the hypothecated property, because he had no interest therein. It was useless to cite the discharged bankrupt, the obligor, because he was no longer bound for the debt. The only right remaining to Norsworthy was a hypothecary right against the property. We regard his proceeding as a hypothecary action, and the notice served in this case interrupted prescription.

The other objections urged by the appellants are without weight.

It is therefore ordered that the judgment herein in favor of the third opponent be affirmed with costs.

Carried by writ of error to the Supreme Court of the United States.

No. 407.

J. J. HASLEY and J. B. RUTLAND, Tutor, v. PHINETTA B. HASLEY.

Where a will was made in these terms: "At home, March 4, 1870. I this day make my will. I want my wife to keep and maneg all of my estate both reil and puranel deuren her lif time and be Lowed to sell eny of the land for not les than the apprsment and I apoint my wife administrater;

Held—That said will contains no substitution and no *fidei commissum*, which are never to be presumed;

That the words of a will, like those of a law, are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words;

That said will, construed by these rules, means that the testator intended to give the usufruct of his estate to his wife, and is valid.

APPEAL from the Parish Court, parish of Ouachita. *Baker, J. R. G. Cobb*, for plaintiffs and appellees. *R. W. & R. Richardson*, for defendant and appellant.

LUDELING, C. J. David Hasley died, in Ouachita parish, on the ninth October, 1873. Phinetta B. Hasley, the defendant, is his widow; and the plaintiffs are children, by a former marriage, and forced heirs of David Hasley.

Hasley and Rutland, Tutor, v. Hasley.

The deceased left a large estate, a considerable portion whereof is claimed to be community. On the fifteenth January, 1873, was probated, as the last will and testament of David Hasley, the following instrument:

“ At Home, March 4th, 1870.

“ I this day make my will.

“ I want my wife to keep and maneg all of my estate both reil and pursnel deuren her lif time and be lowed to sell eny of the land for not les than the apprsment and I appoint my wife administrater.

“ DAVID HASLEY.”

The plaintiffs sue to annul the probate and to have the will declared void, on the following grounds:

That the document is not a will, “ as it does not convey anything to the supposed universal legatee, and is contrary to the laws of this State, containing a substitution and *fidei commissa* clause contrary to law; that plaintiffs are the sole forced heirs of David Hasley, and that said document, so pretended to be probated on the fifteenth of January, 1873, attempts to deprive them of their legitimate portion secured to them by law; and that said pretended will is void for want of meaning, and that the probate thereof is null and void.”

The probate judge decided that the will was null for want of meaning, and annulled the probating thereof.

The defendant has appealed.

We observe that the grounds, upon which the will is attacked, are inconsistent, but we will proceed to notice them.

There is clearly no substitution. *Rachal v. Rachal*, 1 R. 115; C. C. 1520. Nor do we think that there is a *fidei commissum*. *Nimmo v. Bonney*, 4 R. 176; 3 An. 494.

The Code, in abolishing substitutions and *fidei commissa*, has for its object the prevention of the evil of tying up property in the hands of individuals, for a length of time, and placing it out of commerce. The reverse of this appears to have been the intention of the testator in this case. Substitutions and *fidei commissa* are never presumed. Unless the will can not be understood otherwise than in the sense of establishing a substitution or *fidei commissum*, it will be maintained. “ A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none.” C. C., art. 1713.

And the words of a will, like those of a law, “ are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words.” C. C. article 15.

Construed by these rules, we are bound to hold that the testator intended to give the usufruct of his estate to his wife.

The plaintiffs' counsel contends that the words “ keep and manage,”

Hasley and Rutland, Tutor, v. Hasley.

only convey the idea of administration, or agency. The second definition of the word "keep," given by Worcester, is "to have in possession, use, care, or custody." "Keep is a very general term, and is variously applied. A person keeps what is his own, and retains what is not taken from him. He keeps his farm or property, and retains an office." When Paul tells Peter he can keep his gun, or cart, or farm during a certain period, he will be understood to give Peter the use and enjoyment of the property. And such, we think, was the meaning in which the word was used by David Hasley. That he intended to constitute the instrument in question his last will can not be doubted, for he says so in unequivocal language. Can it be supposed that he desired to make his will solely to impose a burden upon his aged spouse, in case she should survive him, by giving her the care and management of his property, without its use and enjoyment?

It appears that on the day after David Hasley made his will, Mrs. Hasley went before a notary and made her will by public act, as she could not write. In that will she gave the use and usufruct of all her property to her husband during his life, and appointed him her executor.

We think it is a fair inference to be deduced from the facts, that the making of said wills was the result of conference and a mutual understanding between the two spouses; that they should make reciprocal testaments in favor of each other, giving the survivor the use and usufruct of the testator's property.

The will of David Hasley has all the formalities of an olographic testament, and it is capable of being understood in the manner interpreted by us. It is our duty therefore to maintain its validity.

It is therefore ordered and adjudged that the judgment of the lower court be set aside, and that there be judgment in favor of the defendant, and against the plaintiffs, rejecting their demand with costs.

ON APPLICATION FOR A REHEARING.

The application for rehearing is refused. The only question under the written agreement in the record before the court *a qua* and this court for decision, was the validity or nullity of the will. Our opinion and decree refer to that question alone.

Kennedy v. Morrison et al.

No. 399.

W. G. KENNEDY v. C. H. MORRISON et al.

This is an action to set aside the pretended transfer of a suit on the ground that it was the sale of a litigious right in contravention of article 2447 of the Revised Code.

It is the actual intention of the parties, and not the form of the instrument, that determines the character of the contract.

Article 2447, Revised Code, did not preclude Morrison, one of the defendants in this case, from making a contract with Kennedy, the plaintiff, for the compromise and settlement of the suit which the latter was prosecuting against him. Farmer, attorney at law, also one of the defendants in the present case, was merely a party interposed, and acquired no rights whatever under the settlement. Morrison gave the consideration under the settlement, and Kennedy transferred the suit for the purpose of having it dismissed.

But even if Farmer had paid the price, or given the consideration, it would not have been the sale of a litigious right in the sense of article 2447, because the purchase was made, not to carry on the litigation, but to end it.

Assuming that the sale or transfer of the suit was actually made to Farmer, there is an insurmountable obstacle in plaintiff's way. He has not returned, nor offered to return, the consideration which he received. He can not keep the fruits of the transfer, even though it be the sale of a litigious right, and ask to be restored to the ownership of the thing which he transferred.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *J. T. Strother*, presiding in the place of Judge *Ray*, recused. *R. G. Cobb*, for plaintiff and appellant. *Morrison & Farmer*, *in propria personæ*.

WYLY, J. In December, 1867, the plaintiff, who had a suit pending in the District Court of the parish of Ouachita for \$5829 87 against C. H. Morrison, signed an act transferring it to the defendant, W. W. Farmer. He now sues to set aside this transfer on the ground that it was the sale of a litigious right, in contravention of article 2447 of the Revised Code, the purchaser, W. W. Farmer, being then an attorney at law practicing in the court where the suit was pending. He also sues to set aside the order dismissing said suit which was granted after the said transfer to Farmer; and also to have the case reinstated on the docket and consolidated with this suit, and he prays judgment against Morrison for \$5829 87, the amount of said suit. The court rejected the demand of the plaintiff, and he has appealed.

C. H. Morrison testifies that: "During the summer and fall of 1867, while the suit of Kennedy against him was pending, and after Grayson had gone into bankruptcy, probably after the property had been advertised, but prior to the sale of the Grayson place by the assignee, Kennedy, W. J. Q. Baker came to me and said that Kennedy said if I would give Kennedy ten mules, and bid in the Grayson place on my oldest mortgage, and pay what money was necessary to pay the remaining costs and some privileged claims, it should be in settlement or compromise of the suit No. 349 (Kennedy v. Morrison). I said to Baker that I would give four mules, on the Filhiol place, and that Kennedy might take his choice out of the lot. Mr. Baker returned to

me after that, and stated that Kennedy was willing to do as I had proposed. Either at that time, or soon afterwards, Mr. Baker, as I understood, representing Kennedy, asked me about the incumbrances, and I admitted there were some judicial mortgages recorded against me. He then suggested if I could not get Farmer to bid it in (the Grayson place) in his name, as Kennedy did not want it to pass through my hands, I being incumbered with those mortgages; to this I consented, provided Farmer was willing. Farmer did consent and carried out the agreement made by myself and Baker, representing Kennedy. I gave the order for the mules; I gave a receipt for the amount of my judicial mortgage against Grayson (\$787 41), and a receipt for Byrne, Vance & Co. for their distributive share on their second oldest mortgage (for \$116 81), * * * I paid the balance of Farmer's bid in money necessary to pay the remaining costs and privileged debts, according to the agreement. For these receipts, the four mules and the money, I received no other consideration whatever from Kennedy, or any one else, except the compromise and settlement of suit No. 349 (Kennedy vs. Morrison.) Kennedy did not pay me the amount of those two receipts; on the contrary, I paid Kennedy in money the amount of Farmer's bid, less those two receipts. Farmer never made any claim on me, or never asserted any right to the suit No. 349; on the contrary, it was well understood that in acquiring the suit he acted solely in my interest. His reasons for acting at all, were to pass the land through him to Kennedy, and thus to avoid the incumbrances or mortgages against me."

The testimony of this witnesses is corroborated by the evidence of other witnesses, and the truth thereof is not disputed by the plaintiff.

Farmer testifies that at the first term of the court after the transfer of the suit in question, it was dismissed in open court by Kennedy's attorney, and that he (Farmer) was present and consented. He also testifies that the suit was not purchased to carry on a litigation against Morrison, but to compromise and to put an end to it. He also swears that the purchase of said suit was not for himself, nor for his use or benefit; that the sole purpose was to assist and benefit Morrison; that he never thought of claiming the suit, or using it or prosecuting it; that he never received or expected to demand any consideration from Morrison for the discontinuance of the suit; that he never received nor paid one cent during the entire business; that he became a party to the transfer of the suit at the request of Kennedy; that it was well understood at the time it was made that it was for Morrison's benefit, "and that it was in full compromise and full settlement of the suit against Morrison." He also testifies that when he bid in the Grayson place at the bankrupt sale he paid no part of the price bid; was never called on by Kennedy to pay it; on the contrary, that Kennedy told

him that it was settled between him and Morrison, as he well knew before he was told.

It appears, therefore, from the testimony of these witnesses and others in the record, that Farmer was merely an interposed party; that although he appeared in the instrument as the transferee of the suit, in fact he never became the owner thereof. The real contract was a compromise between Kennedy and Morrison, and the real intention of the parties was, not to transfer a litigious right, not to foment, but to terminate the litigation. Kennedy had sued Morrison for \$5829 87, and he desired to compromise with him, as he had been advised by his counsel. Kennedy was the assignee of Grayson, a bankrupt, and had advertised his land, known as the Grayson place, for sale. He came to an agreement with Morrison to take, in compromise for his suit against him, the Grayson place and four mules. Morrison was to become the purchaser of said place at the bankrupt sale, and to receipt to him (Kennedy) for the first judicial mortgage which he held, also for the second mortgage of Byrne, Vance & Co.; and besides, to pay over sufficient cash to pay the costs and certain privileged debts.

It appeared afterwards, that Morrison could not well become the adjudicatee of the Grayson place, because there were judgments recorded against him, and the property would become incumbered in passing through his hands. It was then suggested, for Kennedy's protection, that the adjudication should be made to Farmer, and that the whole transaction or business be settled in his name. Farmer, therefore, bought in the land, transferred it to Kennedy, and received in return the transfer of the suit of Kennedy against Morrison, which was dismissed, as before said, at the first term of the court thereafter.

This was all done pursuant to the understanding between Kennedy and Morrison for the compromise and settlement of the litigation, which Kennedy now proposes to revive.

In this case, there was no sale of a litigious right in the meaning of article 2447 of the Revised Code. The object of the parties to this agreement was the reverse of that contemplated by that article. So far from it being the object or intention of the parties to foment litigation, their sole purpose was to compromise and settle the litigation between Kennedy and Morrison. There was but one object in view, from first to last, and that was a compromise. It is the actual intention of the parties, and not the form of the instrument, that determines the character of the contract.

Article 2447, Revised Code, did not preclude Morrison from making the contract with Kennedy for the compromise and settlement of the suit which the latter was prosecuting against him. Farmer was merely a party interposed, and acquired no rights, whatever, under the settle-

Kennedy v. Morrison et al.

ment. Morrison gave the consideration and Kennedy transferred the suit for the purpose of having it dismissed.

But even if Farmer had paid the price, or had given the consideration, and become the owner of the suit, it was not the sale of a litigious right in the sense of article 2447, because the purchase was made, not to carry on the litigation, but for the purpose of dismissing the suit and ending it.

There is another insurmountable difficulty in the way of the plaintiff in this case, assuming that the sale or transfer of the suit was actually made to Farmer. It is this: the plaintiff has not returned, nor offered to return, the consideration which he received. He can not keep the fruits of the transfer, even though it be the sale of a litigious right, and ask to be restored to the ownership of the thing which he transferred.

On the whole, the demand of the plaintiff seems to be utterly without merit, either in law or equity.

Judgment affirmed.

No. 348.

SARAH L. LAY v. Succession of ELIAS O'NEIL.

This court has no jurisdiction over this cause. It involves the examination and correction of a tutor's accounts, and, as set out, is virtually an opposition to said accounts, which are in the probate court, and of which the parish court has jurisdiction, although the amount involved exceeds five hundred dollars. Const. 87, 88.

By the allegations in the petition the tutor's annual accounts, or some of them, are homologated by the probate court, and the opposition to them must be made in the same tribunal.

APPEAL from the Eighteenth Judicial District Court, parish of Bossier. *Fort*, special judge. *J. D. Watkins*, for plaintiff and appellee. *Griffin & Snider*, for defendant and appellant.

HOWELL, J. The plaintiffs, who are the heirs of Isaac Lay, deceased, allege that they inherited from their father a large estate subject to but few debts; that Elias O'Neil was the administrator thereof, and afterwards became their tutor, to wit, in 1859, and so continued until his death, in 1871, his succession being now represented by Mrs. Elizabeth O'Neil; that said Elias O'Neil filed eight annual accounts in the probate court of Bossier parish, contradictorily with the under tutor; that said accounts set forth many illegal and erroneous charges, as shown by a statement annexed to the petition herein, by which it appears that their said tutor is indebted to them in the sum of \$130,390 04, with interest, of which the sum of \$25,442 11 was in gold, for property sold in December, 1866, as per proces verbal; that Mary E. Lay, one of the petitioners, signed a receipt with her husband to said O'Neil for a sum of money, which money she never

saw, and no account was ever shown or rendered to her; that other receipts may have been signed by others of the heirs, but they are not conclusive against any of the petitioners, three of whom are married, and that all the said acts and administration are open to inquiry. They pray that the under tutor of the minor heir be cited, as his tutor has an adverse interest; that Mrs. O'Neil, administratrix, be cited and judgment be rendered in their favor for the sum as above set forth.

Mrs. O'Neil, as executrix, excepts to the jurisdiction of the court, and avers that the parish court has exclusive jurisdiction of this cause.

First—Because the matters in controversy involve the settlement of a succession.

Second—Because they involve the settlement of tutor's accounts and administrative and probate proceedings.

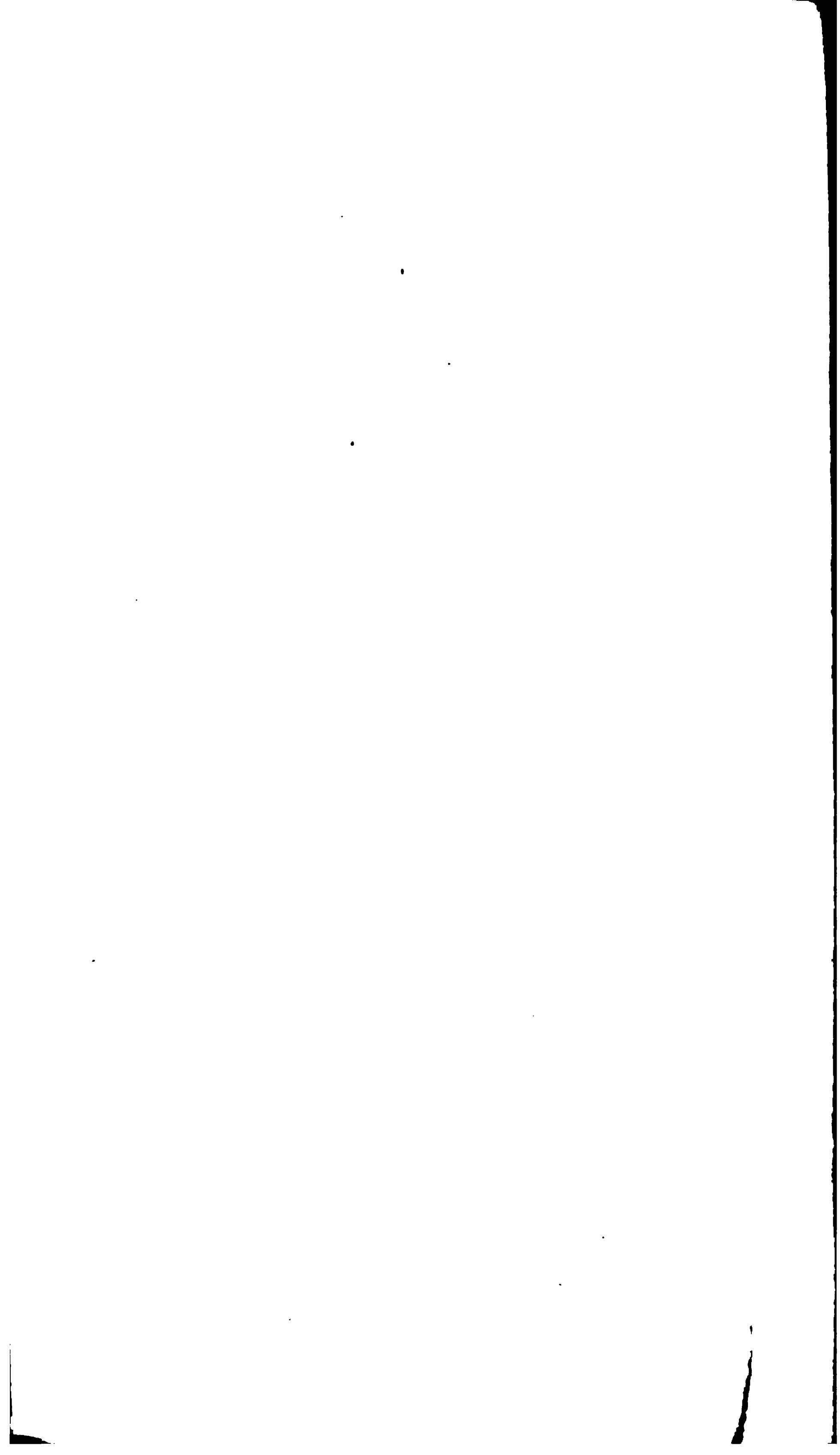
They further except that a direct action for a specific sum can not be brought by the minors or wards against their tutor or his succession on account of his tutorship, their remedy being for the rendition of an account; that the under tutor can not thus sue because the interest of the minor is not opposed to that of his present tutor, and can not sue for a specific sum, but can only sue for the removal of the tutor, and not for an account.

The exceptions were overruled, an answer was filed, and judgment rendered against the defendant, who appealed.

We have come to the conclusion that the district court had not jurisdiction of the cause. It certainly involves the examination and correction of the tutor's accounts, and as set out is virtually an opposition to said accounts, which are in the probate court, and of which the parish court has jurisdiction, although the amount involved exceeds five hundred dollars. Const. 87, 88.

By the allegations in the petition the said annual accounts, or some of them, were homologated by the probate court, and the opposition to them must be made in the same tribunal.

It is therefore ordered that the judgment appealed from be reversed, that the exception to the jurisdiction be maintained and the suit dismissed, with costs in both courts.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

NOVEMBER, 1873.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,

HON. R. K. HOWELL,

HON. W. G. WYLY,

HON. P. H. MORGAN.

Associate Justices.

No. 4584.

MARY C. WINTER AND HUSBAND *v.* H. TOUNOIR, Public Administrator, and NEW YORK WAREHOUSE AND SECURITY COMPANY.

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Act No. 95, approved March 8, 1869, was passed, as its title announces, to carry into effect article 123 of the State constitution of 1868. The judgment which, in this instance, is the act of adjudication, stipulating the amount of the property held in common with a minor and adjudicated to her mother, was duly recorded in the book of mortgages, and was a compliance with the said law.

The prescription of ten years set up by defendants does not apply to said judgment of adjudication. The judgment is not and was never intended by the law to be a judgment for money against the natural tutrix, upon which execution could issue in favor of the minor. The amount, however, of plaintiff's claim, so far as secured by mortgage, must be reduced, as it is shown that a portion of it was for the price of slaves adjudicated with lands. It was a sale, the price of which is still unpaid. The question has already been settled by this court, and is now jurisprudence.

APPEAL from the Seventh Judicial District Court, parish of Pointe Coupee. *Butler, J. Farrar & Montgomery*, for plaintiff and appellant. *Edward Phillips*, for defendants and appellees.

HOWELL, J. This is a suit to enforce a minor's rights of mortgage upon property in the hands of a third person.

John C. Clark, the father of plaintiff, died in 1853, leaving a widow, her mother, two minor children, and a considerable estate, all commu-

Mary C. Winter and Husband v. Tournoir and New York Warehouse and Security Company.

nity property. One of the children died soon after, and on twenty-eighth March, 1855, judgment was rendered and signed, adjudicating all the property to the widow at the appraised value, which judgment was recorded on twenty-second June, 1868.

On first February, 1859, the widow sold the land to one Mrs. Stirling, who assumed to pay the amount due the minor at her majority, to the extent of \$20,000, with six per cent. interest, and stated to be "secured by the tacit mortgage, accorded by law." This act of sale was not recorded until the eighteenth June, 1866, when it seems to have been recorded in the book of mortgages, and was reinscribed on eleventh December, 1869.

On the twentieth May, 1859, the widow filed an account, showing the sum due the minor to be \$9688 95, and on the ninth of June, of that year, this account was homologated, and the judgment signed. This judgment is not recorded.

On the nineteenth January, 1866, prior to the recording of the act of sale from Mrs. Clark to Mrs. Sterling, the latter mortgaged the said land to one R. B. Hill, who transferred the mortgage notes to the New York Warehouse and Security Company, one of these defendants. In this act, which was recorded on seventh February, 1866, is a recital of the minor's mortgage, as existing, for \$12,489 59, with six per cent. interest from February 1, 1859, as fixed by judgment, and payable at the majority of the minor, then about fifteen years old.

After this, to wit, on eighteenth June, 1866, as above stated, the act of sale from Widow Clark to Mrs. Sterling, of first February, 1859, was recorded in the mortgage book, and reinscribed December 11, 1869. On twenty-fifth April, 1868, the said land was sold at Marshal's sale, under foreclosure of the Hill mortgage, and purchased by the New York Warehouse and Security Company, holder of the notes, the mortgage certificate furnished at the time, reciting the minor's mortgage, as existing, for \$20,000, and by special instruction it was not erased upon recording the purchaser's title. On the twenty-second June, following (1868), the judgment of twenty-eighth March, 1855, homologating the adjudication of the community property to the widow was recorded, as already stated. And on the sixteenth October, 1869, an extract of the inventory of Mrs. Clark, deceased, made on the twenty-seventh April, 1861, was recorded.

The principal question presented is, has the minor's mortgage been preserved?

She relies on the recording of the judgment of adjudication, the abstract of inventory of Mrs. Clark's succession, and act of sale from Mrs. Clark to Mrs. Sterling, showing an acknowledgment of \$20,000 due the minor and secured by mortgage.

Section six of act No. 95 of 1869, approved March 8 (session acts, p.

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115), provides: "That when mortgageable property has been adjudicated to either parent of the minor, the act of adjudication shall be recorded in the book of mortgages in the parish in which the property is situated, and it shall operate a mortgage and vendor's privilege; the amount of the value of the property, as stipulated in the act, shall operate a mortgage against such property in favor of the minor; and no such adjudication shall have any legal or binding effect until such record is made."

This statute was passed, as its title announces, to carry into effect article 123 of the constitution of 1868, which made it the duty of the Legislature to provide by law for the registration and preservation of tacit mortgages then existing in favor of minors and others, as well as any subsequently arising or created. The judgment, which, in this instance, is the act of adjudication, stipulating the amount of the property held in common with the minor and adjudicated to the mother, was duly recorded in the book of mortgages, and was, we think, a compliance with the said law.

There can be no question that the mortgage existed up to January, 1870, in favor of the said minor, under the laws and jurisprudence then in force, and it was only a question of preservation or perpetuation, as contemplated by the constitution, prior to the first day of January, 1870. We must think that it was preserved and perpetuated by the compliance with the above law as stated. What the law directed to be done in such a case, was done, and the rights of the minor in this respect were protected.

The prescription of ten years, set up by defendants, does not apply to this judgment of adjudication. The judgment is not, and was never intended by the law to be a judgment for money against the natural tutrix upon which execution could issue in favor of the minor. Nor is the claim of the plaintiff prescribed. The amount, however, so far as secured by mortgage, must be reduced, as it is shown that a portion of it was for the price of slaves adjudicated with the land. It was a sale, the price of which is still unpaid.

This question has already been settled by this Court, and is now jurisprudence. See 21 An. 537, 643, 661.

The proportion of the slave to other property was as thirty-five is to thirty-two—a fraction more than one-half. The amount due the minor on twentieth May, 1859, was \$9688 95. The proportion we ascertain to be enforceable is \$4420 with five per cent. interest from said date, and for which the plaintiff should have the right of mortgage upon the property described in her petition, this being the only matter brought up by this appeal, the plaintiffs having appealed from the judgment in favor of the New York Warehouse and Security Company.

Mary C. Winter and Husband v. Tournoir and New York Warehouse and Security Company.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that the plaintiff, Mary Clark, wife of William S. Winter, be decreed to have a legal mortgage on the following described tracts of land acquired by the New York Warehouse and Security Company at judicial sale on twenty-fifth April, 1868, and now in their possession, to wit: All of lots number forty-nine and fifty, and so much of lots number fifty-one, fifty-two and fifty-three as lies south of a line drawn from the front corner of lots fifty-three and fifty-four to the rear corner of lots fifty and fifty-one; also so much of section seventy-six as is found south of the east and west dividing line of the same, west of the south-east eighty-acre lot and north of a line running due east from the back corner of lots forty-eight and forty-nine, all in township four, of range eight east, in the Southeastern Land District, in the parish of Pointe Coupee—the whole tract above described containing in all six hundred and twelve acres more or less. And also the following described tracts of land on the west bank of Bayou Fardoche, purchased by J. C. Clark from James K. Harris, viz: lots or sections eighteen, twenty and twenty-one in township four, range eight east, containing 1138.85 acres, situated on Bayou Fardoche, in said parish, and that the same may be ordered to be seized and sold to pay and satisfy the above sum and interest, with costs in both courts.

WYLY, J., *dissenting*. In 1853, John C. Clark, the father of the plaintiff, died in the parish of Pointe Coupee, leaving a surviving widow and community property consisting of a plantation and slaves inventoried at \$67,113 25. In 1855, this community property was adjudicated to Mrs. Clark, the mother of the plaintiff, according to the provisions of article 333 of the Code of 1825.

In 1859, Mrs. Clark sold the plantation to Mrs. Mary C. Sterling, who subsequently mortgaged it for \$75,000 to Richard B. Hill. This mortgage was subsequently transferred to the defendant, the New York Warehouse and Security Company, who purchased the plantation under the foreclosure of said mortgage.

In May, 1859, Mrs. Clark filed her final account, showing that \$9683 95 were due the plaintiff, her minor daughter, after paying all the debts of the community.

The plaintiff, Mary Clark, having been emancipated by marriage, brought this suit against H. Tournoir, the legal representative of the succession of her mother, and against the New York Warehouse and Security Company, to recover judgment for the amount due her from the succession of her father, and to enforce her mortgage on the plantation held by the New York Warehouse and Security Company.

The court gave judgment as prayed for against the legal representa-

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tive of the succession of the mother of the plaintiff, but refused to recognize and enforce the tacit mortgage on the plantation. From this part of the judgment plaintiff appeals.

I think the registry of the act of adjudication of the community property pursuant to article 338 Civil Code, prior to the first of January, 1870, was a sufficient compliance with the registry laws and the Constitution of 1868; and that it continued in force the mortgage of the plaintiff against her mother, her tutrix, to secure the sum due her resulting from said adjudication.

But the defendant, the New York Warehouse and Security Company, the present owners of the plantation affected by this tacit mortgage, contends that, as the common property adjudicated to the mother of the plaintiff was land and slaves, the court can not enforce the claim of the plaintiff without enforcing a debt in part for slaves, in contravention of the jurisprudence of this State, which requires debts of this character to be reduced to the extent of the consideration thereof not for slaves. I think this is an objection that this defendant can not set up; because the bases of plaintiffs' demand are the judgment adjudicating the common property in 1855, and the judgment homologating her mother's final account of administration in May, 1859, which judgments existed prior to the mortgage debt, under which the defendant, the New York Warehouse and Security Company, acquired the property.

It is well settled that a creditor whose claim arises subsequent to the rendition of a judgment can not demand its nullity for want of consideration of the debt on which it was based, or for any other cause.

It is only creditors whose claims existed at the time of the rendition of the judgment, or who had an adverse interest, that could be injured by it; therefore they only can demand its nullity.

When these judgments were rendered, upon which plaintiff's action is based, the New York Warehouse and Security Company had no adverse claim whatever, because the mortgage debt under which they bought the property was not then in existence.

In the case of Silliman it was held that the objection to the slave consideration of the debt upon which a judgment is based, can not be raised by one whose claim arose subsequent to the rendition of said judgment.

The judgment in this case, as against the legal representative of the succession of the mother of the plaintiff, can not be disturbed, because no appeal has been taken therefrom.

The judgment adjudicating the common property, pursuant to article 338 C. C., is not a money judgment in the meaning of section 2831 of the Revised Statutes of 1870, nor is the judgment homologating the account filed by the mother of the plaintiff; therefore the prescription

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of ten years, pleaded in bar thereof, is inapplicable. *Wade v. Caspari*, 24 An. 211, is cited as authority to the contrary, but an examination of that case will show that it is not like the one before us.

There, the court applied prescription to a money judgment obtained by a tutor against his predecessor, who had been removed. Here, the tutrix causes the common property to be syndicated to her, pursuant to article 338 C. C., and she procures the homologation of her final account as administratrix. There was no money in these judgments that the tutrix was then called upon to surrender; on the contrary, it was her duty to retain it until the termination of the tutorship. These judgments were clearly not prescriptible.

I, therefore, dissent from that part of the decision of the majority of the court reducing the claim of the plaintiff on account of the slave consideration of part of the debt.

Rehearing refused.

No. 4761.

STATE OF LOUISIANA, ex rel. J. HAYS, v. JUDGE OF THE FIFTH DISTRICT COURT, Parish of Orleans.

If the appellant, when called on, does not adduce proof affirmatively to show that his surety is good, and no evidence to impeach him is offered, it is now the jurisprudence of this court that the judge *a quo* can not pronounce him to be insufficient and order execution to issue.

Some proof is necessary to destroy the presumption of sufficiency arising from the acceptance of the bond, with the surety signing it.

APPPLICATION for a writ of Prohibition directed to *E. N. Cullom*, judge of the Fifth District Court, parish of Orleans. *B. R. Forman*, for relator.

HOWELL, J. The only question presented in this proceeding is, whether or not the lower court can order the execution of a judgment, from which a suspensive appeal has been taken, because the appellant fails to produce and justify his surety on the trial of a rule taken by the appellee for the purpose of testing the sufficiency of the bond. Or, in other words, if when called on, the appellant does not adduce proof affirmatively to show that his surety is good, and no evidence to impeach him is offered, can the lower judge presume him to be insufficient, and order execution to issue?

It is now the jurisprudence of this court that he can not, because some proof is necessary to destroy the presumption arising from the acceptance of the bond with the surety signing it. See 22 An. 592; 23 An. 714.

It is therefore ordered that the prohibition herein be made perpetual with costs, and without prejudice to appellee's right to impeach the surety on the appeal bond.

 Auguste and Joseph Pierre v. Fontenette et als.

No. 4757.

25	617
117	971

AUGUSTE AND JOSEPH PIERRE v. AUGUSTE FONTENETTE et als.

Emancipation gave to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, although dormant during the slavery of the parties, produced, from the moment of their freedom, all the effects which result from such contract among free persons.

But the marriage which was to produce these civil results must have existed at the time the emancipation took place. If the marriage was dissolved before emancipation, the parties' rights were no longer dormant; they were dead; and the subsequent emancipation, as it could not resuscitate the marriage, could produce none of the civil fruits which are the results of a civil marriage.

A PPEAL from the Probate Court, parish of St. Martin. *Fournet, J. DeBlanc & Perry*, for plaintiffs and appellants. *Felix Voorhies and E. Simon*, for defendants and appellees.

MORGAN, J. Magdeline Vincent, by what purports to be a nuncupative testament by public act, instituted Auguste Fontenette her universal legatee. Auguste and Joseph Pierre allege that they are the nephews of Magdeline Vincent. They ask to be recognized as her heirs, and that her will be declared a nullity. The exception is, that plaintiffs are not the legitimate issue of Magdeline Vincent's brother, through whom they claim, and can not, therefore, attack the will.

The plaintiffs and the testatrix were born slaves. Magdeline Vincent's husband died a slave, and so did the mother of these plaintiffs. Their father purchased his freedom. Both their father and mother died before the war.

Plaintiffs claim that their father and mother having been married according to the forms prescribed by the law in regard to persons of their class, their subsequent emancipation gives to the marriage of their parents a civil effect which it would not otherwise have had, and confers upon them the title of legitimacy, and the consequent right of inheritance. It is established that their father and mother lived together as husband and wife, with the consent of their masters.

By the law as it was at the time when slavery existed, slaves could make no contract, except with reference to their freedom. They could not marry, except with the consent of their masters, and their marriage produced none of the civil effects which result from such a contract. They could transmit nothing by succession or otherwise, except that what they might have inherited from free persons, had they been free, might pass through them to such of their descendants as might have acquired their liberty before the inheritance fell to them. C. C. 174, 176, 182.

Marriage is a civil contract; legitimation is the result of that contract; the right of inheritance is also the result of it. These are the civil effects of the contract.

It has been held that emancipation gives to the slave his civil rights,

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and that a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons. *Girod v. Wells*, 6 Martin, 559. This doctrine we do not deny or controvert. But we think that the marriage which is to produce these civil results must exist at the time the emancipation takes place. In this case the marriage was dissolved before emancipation. The parties' rights, therefore, were not dormant; they were dead; and the subsequent emancipation, as it could not resuscitate the marriage, could produce none of the civil fruits which are the results of a civil marriage.

The legitimation, then, of these plaintiffs became impossible as a result of marriage, by the death of one of their ancestors. They can not, therefore, claim to be legitimate heirs; and as it is only by reason of their possessing this status that they can attack Magdeline Vincent's will, it follows that the exception taken against them was properly maintained, and the judgment must be affirmed.

Judgment affirmed.

TALIAFERRO, J., *dissenting*. The plaintiffs, claiming to be the legal heirs of one Magdeline Vincent, bring this suit against Auguste Fontenette, to recover the succession of Magdeline in his possession, the ownership of which he claims as universal legatee under her act of last will, duly probated and ordered to be executed. The plaintiffs seek in this action to have the will of Magdeline annulled and to be recognized as her legal heirs. The defendant, by exception, denies that the plaintiffs are the legal heirs of Magdeline Vincent; that they have any right to her succession; and, having no interest in setting aside her last will and testament, they have no cause of action.

The exception was sustained, judgment rendered in favor of the defendant, and the suit dismissed.

The pretensions of these plaintiffs are resisted on the ground that by the laws that existed in Louisiana prior to emancipation they were incapable of inheriting property; that no legal marriage did or could take place between their parents, and therefore they were not legitimate heirs, and were incapable of being legitimated.

A solution of the question presented must be sought for in the proper construction to be given to the one hundred and eighty-second article of the Code of 1825, interpreted in reference to the changed condition of the plaintiffs by emancipation.

The father of these plaintiffs was a slave, who acquired his freedom and died before the abolishment of slavery in this country, possessed of a small amount of property. Their mother died a slave; her death

preceding that of the father. Magdeline Vincent was the sister of Pierre, the father of the plaintiffs. She, it appears, originally a slave, had during the existence of slavery become free, and at the death of Pierre succeeded as heir to his small succession. She died in 1869, leaving a will, by which she constituted Auguste Fontenette her universal legatee. The status of the plaintiffs was that of slaves up to the time of the general emancipation.

Magdeline Vincent, as we have seen, had become free previous to the general emancipation, and by that event Auguste and Joseph Pierre acquired the status of free persons. This was their condition at the time of the decease of Magdeline in 1869. They were, therefore, capable of inheriting from her, unless there existed at that time some legal disability other than that which previously existed on account of their being slaves. The question of their legitimacy is the principal one to be determined.

The cohabitation, by their own consent and by the permission of their master, of a man and woman who were slaves, was termed by the one hundred and eighty-second article of the Code of 1825 a marriage. The words of that article are: "Slaves can not marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contract."

A marriage thus entered into possessed all the efficacy which could have been imparted to it had it been accompanied with more ceremonies and formalities. The interposition of a priest or minister of the Gospel to pronounce the formulas of uniting persons in wedlock could have conferred upon slaves entering into that state no greater rights or privileges. It would seem, then, that the objection opposed to these plaintiffs, that their parents were not married according to law, is not well taken, inasmuch as in their case all the requisites necessary to constitute marriage were complied with. The sense in which we are to understand the provisions of article one hundred and eighty-two of the Code of 1825, would seem to be that the marriages of slaves do not, during the condition of the parties as slaves, produce any of the civil effects which result from such contract. In other words, that the civil rights resulting from the marriage of slaves were, during the period they occupied that status, dormant and inoperative; but on passing out of that status into the opposite one of freedom, those rights revived and became effective.

In the case of *Girod v. Wells*, 6 Martin's Reports, page 559, it was announced by Judge Matthews, the organ of the court, that "it is clear that slaves have no legal capacity to assent to any contract. With the consent of their masters they may marry, and their moral power to agree to such a contract or connection as that of marriage can not be doubted; but whilst in a state of slavery it can not produce

any civil effect, because slaves are deprived of all civil rights. Emancipation gives to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produces all the effects which result from such contract among free persons."

It is clearly shown that the father and mother of the plaintiffs lived together on the plantation of their former owner as man and wife, according to the general custom of slaves at that period; that they were so recognized by their master and by their acquaintances, white and black, in the neighborhood; that Pierre and Magdeline were reputed brother and sister, and as between themselves they recognized that relation. It is likewise shown that the plaintiffs were recognized by their owner and generally by others acquainted with them as the children of Pierre and his wife, their mother. It is shown that the general custom among the slave population in the matter of marriage was to obtain the consent of the master and mistress, and live together in the relation to each other of husband and wife. The formality of a marriage ceremony by a priest or other person authorized to solemnize marriage was sometimes resorted to, but this was by no means a general usage. In the great majority of cases the simple agreement of the parties themselves to form the relation of husband and wife, followed by the consent of the master or of the master and mistress, constituted marriage among the slave population of the State.

Article 182 of the Civil Code of 1825 declared that "slaves can not marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contract." A solution of the question presented must be sought for in the proper construction to be given to this article of the Code, interpreted in reference to the changed condition of the parties by emancipation.

The plaintiffs' parents were married in the manner the law permitted marriages to take place between persons in their condition of life. The civil rights resulting from marriage between white people did not accrue from their marriage at the time it took place because these rights, from motives of policy then existing, were withheld. Afterwards, when the motives which prompted the prohibition ceased, the disabilities ceased also. *Cessante ratione cessat et ipsa lex.* During the state of slavery the rights and benefits arising from marriage were, in their case, suspended. At the termination of slavery these rights and advantages were developed and took effect. They accrued to the benefit of the heirs who, by the general emancipation, became free, although their parents did not survive the period of slavery. The heirs became legitimated and capacitated to receive. They inherit from Magdeline Vincent, through their father, whose succession was

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taken by her, the acknowledged sister of Pierre, and who acknowledged his children as her nephews. Civil Code of 1825, articles 176 and 945.

But it is urged that by the statute of 1868 (No. 210, page —, of Statutes of 1868) provision was made for persons of this unfortunate class, enabling them to legalize private or religious marriages upon complying with certain formalities within two years from the passage of the act; and that the enactment of this statute shows that it was never the intention of the Legislature to sanction a marriage entered into merely by the consent of the master and not followed out and perfected by a solemnization of some sort. This act, I conceive, came in aid of persons whose cohabitation had never been sanctioned by any proceeding which the law recognizes as marriage. It applied to all persons whether free or bond, white or black. Besides, it is not for the Legislature to divest rights acquired from any form of marriage recognized by law.

No. 4776.

STATE ex rel. MRS. JANE D'ARCY v. JUDGE OF THE FOURTH DISTRICT COURT, Parish of Orleans, et als.

The question whether the relator in this case had, as owner of an urban lot of ground, the right to build a wall or fence on her own property for her own profit and convenience, involves a larger interest than the five hundred dollars damages claimed by her next neighbor as resulting from the erection of said wall or fence, and therefore a suspensive appeal lies to this court from a judgment rendered against relator. It is a question concerning the ownership of property and its enjoyment, and may involve the entire value of the property on which the wall or fence is built.

APPPLICATION for writs of mandamus and prohibition directed to *B. L. Lynch*, Judge of the Fourth District Court, parish of Orleans. *Cotton & Levy*, for relator. *B. L. Lynch*, in *propria persona*. *Richard Shackelford*, for Andrew Parle.

MORGAN, J. The relator, it appears, is the owner of a house and lot of ground within the corporate limits of this city, in which she resides. Upon her own lot she caused a high fence to be erected, which prevents her house and premises from being overlooked by her neighbor, Parle. For exercising what she considered this act of ownership Parle brought suit against her for five hundred dollars damages, for which he had judgment. From this judgment the relator asked for an appeal to this court, which was refused, on the ground that the sum claimed in Parle's petition does not come within our appellate jurisdiction.

In our opinion the claim he presents is not one exclusively for an insignificant sum of money. It is the assertion of a right which concerns the ownership of property and its enjoyment. It is to be deci-

State ex rel. Mrs. Jane D'Arcy v. Judge of the Fourth District Court et al.

sive of the question whether or no the proprietor of a house can protect himself and his family from public view, and their interior domestic life from the, perhaps, impertinent overlooking of his neighbor; whether he must have his family subjected to view the behavior of his neighbor in his own house, however scandalous such behavior may be, whenever they go to their windows, with the alternative of being completely blocked out from air and light; whether, in short, a man may enjoy in peace and comfort what he has acquired by toil.

It involves, also, the right of the owner to build a wall on his own property, for his own profit or convenience, without incurring the obligation of paying damages therefor. It may, indeed, and in many cases certainly would, involve the entire value of the property upon which the wall or fence is built.

When, therefore, Parle attacked Mrs. D'Arcy because she exercised this right, he put at issue something which involved a larger interest than five hundred dollars. In point of fact he set up a revolving claim for five hundred dollars, to be prosecuted against his neighbor as often as the first one should be satisfied, or as long as she prefers her privacy to his scrutiny. The rights of property, its use and enjoyments, are of too much consequence to be thus trifled with.

Let the rule be made peremptory.

No. 4781.

STATE OF LOUISIANA ex rel. SOLOMON SILVERSTEIN, v. JUDGE OF THE FIFTH DISTRICT COURT, Parish of Orleans.

Where all objections to the solvency of the surety or sureties on the suspensive appeal had been waived, and no controversy waged as to the sufficiency of the bond which was received as executed in the manner required by the order of the court, said court was divested of jurisdiction over the case, and the subsequent proceedings under the rule to show cause why the suspensive appeal should not be set aside, consequently without effect.

APPPLICATION for a writ of prohibition, directed to the Judge of the Fifth District Court, parish of Orleans. *T. A. Bartlett*, for relator. *A. L. Tissot*, Judge of the Second District Court, acting in place of *E. N. Cullom*, Judge of the Fifth District Court, parish of Orleans.

TALIAFERRO, J. The relator sets forth that, in a suit instituted against him by certain parties to dispossess him of property occupied by him under lease not yet expired, a judgment was rendered against him in September, 1873, ordering him to vacate the premises and deliver the same to the plaintiffs; that he applied to the court which rendered the judgment for a suspensive appeal, which was granted within ten days from the time the judgment was signed, and made returnable to this Court on the first Monday of November, 1873, conditioned that the relator enter into bond, with good and sufficient

State of Louisiana, ex rel. Silverstein, v. Judge of the Fifth District Court.

security, according to law, which he avers he did do in conformity with the order of the court. The relator complains that, notwithstanding his compliance with the order of the court in furnishing security on his bond, the sufficiency of which was not contested, a rule was taken on him to show cause why his suspensive appeal should not be set aside; and, upon hearing, the same was made absolute and the appeal annulled and set aside; that the plaintiffs thereupon obtained an order of the court, directed to the sheriff, to eject the relator from the premises in conformity with the judgment appealed from. The relator now applies to this Court for a writ of prohibition against further proceedings in the case, and for an order to the court *a qua* to send up the appeal taken by him as aforesaid.

From the facts that appear in this case, we think the relator entitled to the relief he seeks; all objections to the solvency of the surety or sureties on the appeal bond were waived and no controversy waged as to the sufficiency of the bond. Having received the bond executed in the manner required by the order of the court, we think the court was divested of jurisdiction of the case, and the subsequent proceedings under the rule consequently without effect.

It is therefore ordered that a writ of prohibition issue directing the judge of the Fifth District Court to take no further action in the case numbered 4857, entitled Arnold Ellis et al., Trustees, v. S. Silverstein, on the docket of said court, until the case be heard on appeal, and that he be ordered to send up to this court the appeal granted to the relator in said case.

No. 4723.

HYPOLITE MOSSY v. H. H. HARRIS, Tax Collector.

25	623
48	140

To authorize a writ of mandamus, there must appear a specific ministerial duty which the applicant has a direct right or interest in having enforced.

Where the pleadings indicate that the application is simply to obtain a judicial order in favor generally of holders of a certain class of warrants, and not to secure a specific right to a particular party, it is not a serious contest, and not a case for a mandamus.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Kennard, Howe & Prentiss*, for plaintiff and appellant. *A. P. Field*, Attorney General, for respondent and appellee.

HOWELL, J. The relator, who resides in the city of New Orleans, alleges that "he is the lawful owner and holder of two warrants, drawn by the Auditor of Public Accounts, of the State of Louisiana, on the treasury of said State, for \$300 each, for the salary of L. B. Watkins, as district judge (of the eighteenth judicial district), which warrants are by law receivable for all taxes and license taxes, the proceeds whereof go to the general fund of the treasury; that he offered said warrants to H. H. Harris, tax collector of the second dis-

trict of New Orleans, in payment of an equal amount of license taxes, the proceeds whereof go by law into the general fund of the treasury, but that the said tax collector has illegally refused to do his duty in the premises belonging to the office with which he is clothed; that the action of the said tax collector is a denial of right and justice;" and he prays for a writ of mandamus, commanding the said tax collector "to receive in payment of said license taxes as above set forth." We presume the words "said warrants" are accidentally omitted.

An exception was filed by the Attorney General, that the demand of the petition sets forth no cause of action, and that if it does, then the law invoked violates section 10 of article 1 of the Constitution of the United States, which prohibits a State from emitting bills of credit, or making anything but gold and silver a tender in payment of debts. From a judgment refusing the mandamus the relator has appealed.

Conceding that the receiving of State warrants for taxes or licenses is a ministerial duty imposed by law, which a tax collector may be compelled by mandamus to perform (a question upon which it is unnecessary now to express an opinion), the allegations made by this relator did not disclose a sufficient interest to authorize him to sue out the writ. He does not show any legal right of which he or any one else is deprived, or any injury caused to him by the action of the defendant. He does not allege that he or any one whom he represents is entitled to a license for any particular calling or vocation, to follow which a license is necessary. He makes simply a general allegation that he offered two certain warrants of \$300 each, in payment of an equal amount of license taxes, for whom or for what purpose is not shown or intimated. If he was endeavoring to purchase from the tax collector a quantity of licenses, he of course must fail in his application. If his purpose was merely to obtain judicial authority for the defendant and other tax collectors to receive from any and all persons a certain kind or class of warrants, he must equally fail. It is the province of courts to pass on real contests between parties, enforce or protect specific rights, and redress actual wrongs, and not to issue general orders regulating or defining the duties of public officers. Certainly this last is not the purpose of the writ of mandamus. To authorize it there must appear a specific ministerial duty, which the applicant has a direct right or interest in having enforced. The relator does not show any such right, nor that he will suffer any particular wrong by the alleged refusal of the defendant to receive the said warrants. The pleadings indicate that this case is presented simply to obtain a judicial order in favor generally of holders of a certain class of warrants, and not to secure a specific right to a particular party, and is, therefore, not a serious contest, and not a case for a mandamus.

Judgment affirmed.

State ex rel. Blackemore, Wooldridge & Co. v. Graham, Auditor.

No. 3699.

STATE ex rel. BLACKEMORE, WOOLDRIDGE & Co., v. JAMES GRAHAM, Auditor.

A third party, appealing from a judgment, must allege and show a direct pecuniary interest in the subject matter of the suit.

The act of nineteenth April, 1871, which provides for the refunding of certain taxes improperly collected by the State, and on which the relators in this case rest their claim, is unconstitutional, as it clearly increases the State debt to an amount exceeding twenty-five millions.

Said act of the nineteenth April, 1871, is also in violation of article 111 of the State Constitution, because, while creating a debt exceeding one hundred thousand dollars, it does not provide adequate ways and means for the payment of the current interest and of the principal when the same shall become due.

No appropriation was made by law for drawing from the Treasury the large sum needed to reimburse the numerous claimants applying for this refunding of taxes under the law of 1871, which is, therefore, in violation of article 104 of the State Constitution.

The act No. 55, approved April 4, 1865, has never been held to be in violation of the State Constitution.

A PPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Semmes & Mott, Breaux, Fenner & Hall, Hays & New*, for relators, *Hornor & Benedict* and *W. W. Howe*, for respondent. *S. Belden*, Attorney General, for State in intervention. *Denne & Belden*, for John Klein, in intervention.

TALIAFERRO, J. By section three of an act of the Legislature, approved April 4, 1865, entitled "An act to provide for the increase of the revenue and raise means to pay the interest on the State debt," it was provided "That there shall be assessed and collected the sum of one quarter of one per cent. on the annual gross sales or receipts of each and every person pursuing any trade, profession or occupation, whose annual receipts exceed the sum of two thousand dollars." A class of merchants in New Orleans, engaged principally in what is called "the Western trade," receiving and selling, under commission, Western produce, such as pork, bacon, flour, corn, cotton bagging, etc., made objection to the payment of this tax, on the ground that commodities of that kind were consigned to them for sale by citizens of the United States residing beyond the limits of the State of Louisiana, and sold by them in the form in which such produce was prepared by their constituents beyond the limits of the State of Louisiana. They contended that the property thus introduced into Louisiana from other States, and thus sold, is exempted, by the Constitution of the United States, from import duty or other tax for the benefit of the State of Louisiana. In 1867, the commercial house of Kennedy & Co., large dealers in Western produce, was sued by the State for the amount of tax assessed to them under the act of fourth of April, 1865, and the question underwent judicial investigation.

In the case of the State v. Kennedy & Co., 19 An. 424, this Court held the tax to be null on the ground that it was contrary to section

State ex rel. Blackemore, Wooldridge & Co. v. Graham, Auditor.

ten of the first article of the Constitution of the United States, which declares that "No State, without the consent of Congress, shall lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The Legislature passed an act approved on the nineteenth of April, 1871, which provided "that all taxes which were collected by the State under the third section of an act entitled 'an act to provide for increasing the revenue of the State and raise means to pay interest on the State debt, approved fourth of April, 1865,' shall be and are hereby refunded to the parties who paid the same, or to their proper representatives, and the Auditor of Public Accounts be and he is hereby authorized and required to issue to said parties, or to their proper representatives, certificates for the amount paid by them which shall be receivable by all State tax collectors in payment of the general fund tax."

The purpose of the present suit by Blackemore, Wooldridge & Co. is to compel the Auditor to issue to them certificates for \$1411 70, the amount of the aforesaid tax, which they allege they have paid under the act of fourth of April, 1865. They proceeded by mandamus, and a rule being taken against the Auditor to show cause, he answered, in substance, "that prior to the nineteenth of April, 1871, the debt of the State exceeded twenty-five millions of dollars, and that the annual revenues of the State are insufficient to meet the necessary expenditures and current expenses of the State under the present rate of taxation; that the claim of the relators form no part of the current expenditures for the necessary government of the State, or for the maintenance of its peace and order, and that the General Assembly was without power to pass the act of 1871, in violation of the constitutional amendment restricting the State debt, which was promulgated on the fifteenth of December, 1870, and it is therefore null and void. He further answers that the sum collected as taxes under the act of fourth of April, 1865, and which the act of 1871 directs to be refunded, amounts to \$525,475 88; that the reimbursement of that sum would be indirectly an appropriation exceeding \$100,000, and no means are provided to meet such expenditures, and is in violation of article 111 of the Constitution of 1868.

The Attorney General intervened on the part of the State, adopting the defense of the Auditor. Judgment was rendered in the court below making the mandamus peremptory, and the Auditor appealed.

After the judgment was rendered, Klein, a third party, alleging that his interests were affected by the judgment, appealed. There is a motion to dismiss his appeal on the ground that he shows no interest in the controversy that authorizes his appeal. He sets up in his intervention that he is the owner and holder, as agent, of State warrants to

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an amount over \$100,000, payable out of the general fund, and if the judgment appealed from is not reversed he will suffer great injury, and loss exceeding \$20,000.

A third party appealing from a judgment must allege and show a direct pecuniary interest in the subject matter of the suit. 21 An. 743. We do not think the intervenor in this case has shown such an interest in the subject matter of the suit as entitles him to appeal. The appeal is therefore dismissed at the cost of the appellant.

We can not regard the act of April, 1871, under which the relators claim to have their debt or amount of tax refunded, otherwise than as virtually creating a debt of more than half a million of dollars. This would clearly increase the State debt to an amount exceeding \$25,000,000, and therefore under the act unconstitutional. It recognizes and makes exigible an obligation to pay certain claimants a sum of money amounting to more than \$100,000. It does this in violation of article 111 of the State Constitution, which is express that "whenever the General Assembly shall contract a debt exceeding in amount the sum of \$100,000, unless in case of war to repel invasion or suppress insurrection, it shall in the law creating the debt provide adequate ways and means for the payment of the current interest and of the principal when the same shall become due."

"No money," it is provided by the article 104 of the Constitution, "shall be drawn from the treasury but in pursuance of specific appropriations made by law." No appropriation was made by law for drawing from the treasury the large sum needed to reimburse the numerous claimants applying for this reimbursement. The equitable grounds set up in favor of refunding the tax in question we do not regard as entitled to consideration. The decision of this court in the Kennedy case declaring the tax contrary to the Constitution of the United States, can not now be referred to as authority in behalf of those who paid the tax, seeing that the Supreme Court of the United States ruled differently in a case carried before it from Alabama in 1868, where the same question was made, and that tribunal decided that such a tax laid by a State is not contrary to the provisions of the Constitution of the United States. 8 Wallace, 124.

That the act of April 4, 1865, is in violation of the State Constitution has never been held.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the rule be discharged, the relators paying costs in both courts.

LUDELING, C. J., *dissenting*. The defendant has urged several objections to the constitutionality of act No. 93, approved nineteenth of

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April, 1871, only two of which have even the semblance of being well founded. They are, that it violates article 111 of the Constitution, which prohibits the General Assembly from contracting a debt exceeding \$100,000, unless it provides for payment of the principal and interest. If it be conceded that a debt was created by that act, still the Legislature did provide for the payment thereof by making the certificates receivable for taxes. The General Assembly was vested with the discretion to say what ways and means should be provided for the payment of the debt, and that discretion is not subject to the control or suspension of the courts. Cooley, Con. Lim. 187; 36 Barb. 193; 34 Ind. 137; 15 Md. 376; 19 Barb. 81; 23 Ill. 207; 22 An. 555.

The other objection is, that the law violates the constitutional amendment, limiting the State debt to \$25,000,000. Entertaining the opinion, which I expressed in the dissenting opinion in the case of the Factors' and Traders' Insurance Company v. the City of New Orleans, that there is no natural obligation to pay an unconstitutional tax, I can not recognize that the act aforesaid created a debt. It simply recognized a debt which had existed ever since the erroneous payment of the tax. I dissent, therefore, from the opinion of the majority of the court.

WYLY, J. I concur in the dissenting opinion of the Chief Justice. Rehearing refused.

No. 4713.

CITIZENS' BANK OF LOUISIANA v. MRS. JOSEPH DEYNOODT AND HUSBAND.

The statute of 1873 declaring that the amount of the contribution due by the stockholders of a bank shall be recoverable by summary process, as in case of a confession of judgment, is not in violation either of the State constitution or of the federal one.

The statute provides a remedy for the more speedy enforcement of an obligation. It does not affect in any manner the obligation of the contract, nor is it retroactive; it provides only for the future.

APPEAL from the Superior District Court, parish of Orleans. *Harkins, J. A. Pitot*, for plaintiff and appellee. *Clarke, Bayne & Leshaw*, for defendants and appellants.

LUDELING, C. J. This is an appeal from an order of seizure and sale. The only question for decision is, necessarily, whether or not the evidence upon which the judge acted was sufficient to authorize the fiat.

The charter of the plaintiffs and the amendments thereto, together with the original act of mortgage for the amount of defendants' stock, executed by Forstall, and the assumption of the liabilities attached to the stock by the intermediate vendees, and the act executed by the defendants themselves are in evidence. The mortgages are given to

secure the prompt payment of the interests, as they accrue, as well as the principal of the bonds.

In addition to the foregoing evidence is a properly certified copy of the resolution of the Board of Directors, calling upon the stockholders for a contribution to meet the interest to accrue in August on the bonds of the State.

The statute of 1873 provides that the amount of the contribution shall be recoverable by summary process, as in case of a confession of judgment.

We think, therefore, that the evidence authorized the fiat, unless there be some prohibition in the State constitution or in the constitution of the United States forbidding this, and we are of the opinion that no such prohibition exists.

The statute provides a remedy for the more speedy enforcement of an obligation. It does not affect in any manner the obligation of the contract, nor is it retroactive; it provides only for the future.

It is therefore ordered that the judgment of the district court be affirmed, with costs of appeal.

No. 4332.

STATE ex rel. LIVINGSTON & GUTHRIE v. JAMES GRAHAM, State Auditor.

The Attorney General having neglected or declined to take an appeal, after having intervened and gone into the defense of the case, adopting the defense made by the Auditor and superadding grave objections to the relator's claim, it became the duty of the Governor, under this condition of affairs, to take, in the interest of the State, the appeal which he did.

The evidence of a documentary character offered by the Auditor to show that, at the time the contract relied on by plaintiff was entered into, the debt of the State was in excess of twenty-five millions of dollars, was improperly rejected.

APPEAL from the Eighth District Court, parish of Orleans. *Dibble, J. Billings & Hughes, John Ray*, for relators and appellees. *Hornor & Benedict*, for respondent and appellant.

TALIAFERRO, J. This case was before us at the last term of this court and decided adversely to the relators. Upon an application for a rehearing the case was remanded to the lower court for the purpose of obtaining evidence more satisfactory in regard to the amount of the State debt at the time the alleged contract was entered into. See 24 An., pp. 366 *et seq.*

In the court below a judgment in favor of the relators was rendered as on the first trial in that court. From this judgment the Auditor has appealed. An appeal was also taken by Messrs. Hornor & Benedict, attorneys at law, specially engaged and authorized by the Governor to prosecute the appeal. A motion to dismiss this appeal is made on several grounds; the principal one is that the Auditor is without in-

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terest or right in the controversy. The Attorney General neglected or declined to take an appeal after having intervened and gone into the defense of the State, adopting the defense made by the Auditor, and superadding grave objections to the relators' claim. Under this state of affairs, we think it became the duty of the Governor, in the interest of the State, to take the appeal which he did. We think the case fully before this court, and we therefore overrule the motion to dismiss.

The Auditor offered evidence of a documentary character to show that at the time the contract was entered into the debt of the State was in excess of \$25,000,000. This evidence was rejected on purely technical grounds. It should have been admitted. The documentary evidence rejected is appended to a bill of exceptions taken to the refusal of the judge to admit it. The bill of exceptions was well taken. The evidence is before us, and it fully makes out the original allegation in the answers of the Auditor and the Attorney General that the contract is null, as having been made in contravention of that clause of the constitution which forbids an increase of the State debt beyond \$25,000,000.

It is therefore ordered that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant; that the rule be discharged at the costs of the relators.

HOWELL, J. I concur in the decree for the reasons which I gave on the first hearing of this case.

LUDELING, C. J., *dissenting*. I dissent from the opinion of the majority of the court, and I will hereafter file my reasons.

No. 2923.

EUGENE E. LEVY v. PIKE, BROTHER & Co.

The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property.

Where the deposit was a gratuitous one, and where the abstraction of the thing deposited seems to have been one of those bold and adroit acts which are carried out successfully in defiance of ordinary prudence and diligence, and the possibility of which is seen only after its accomplishment, the depositary is not liable, as he would be if the loss arose from gross or inexcusable negligence on his part.

APPEAL from the Seventh District Court, parish of Orleans. Col-lens, J. (Special jury trial.) *Hyams & Jonas*, for plaintiff and appellant. *Hays & New*, for defendants and appellees.

WYLY, J. The plaintiff, a money broker of the city of New Orleans, sues the defendants, who are engaged in a banking business, for \$7504 54, the value of the contents of a tin box deposited by

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plaintiff with the defendants for safe keeping, which was stolen by thieves on thirteenth day of December, 1869, and for the further sum of \$400, the reward paid to recover a portion of the contents of said box, not included in the above estimate of loss, and also \$100 costs of advertising the robbery. The plaintiff alleges that this loss was occasioned by the negligence and want of care of the defendants, the depositaries.

The defendants deny that there was a want of care on their part, and aver that they exercised the same attention in preserving the tin box of plaintiff they exercised in preserving similar boxes belonging to other depositors, and the same they exercised in keeping their own property; and this attention and method of acting were well known to plaintiff, who acquiesced in and took advantage thereof for his own convenience.

On the verdict of a special jury, the court gave judgment for the defendants, and the plaintiff appeals.

It appears that during the year 1869 the plaintiff deposited his money and kept his account with defendants; he also deposited with them every night the tin box in which he kept his stocks, bonds, scrips, uncurrent money, warrants, jewelry, gold, and marketable securities of every description.

He was in the habit of delivering the box to them between 4 and 5 P. M., every evening, and calling for it every morning, between 8 and 9 A. M.

On receiving the box, the defendants would give plaintiff a metallic check, "No. 1786," on which, besides, was engraved these words: "Pike, Lapeyre & Brother, deliver to bearer," and the box would only be returned to the plaintiff on presentation of this check.

It was the custom of the defendants to take care of similar boxes for their depositors, and sometimes for those who did not keep bank accounts with them. They had a large vault in the rear of their building, in which over a thousand boxes of a similar character, belonging to various persons, were deposited for safe keeping.

It is proved that the plaintiff sustained the loss complained of by reason of the loss of the tin box, which was deposited with defendants for safe keeping.

It appears that on the morning of the thirteenth of December, 1869, before business hours, the receiving teller of the defendants brought the box in question, with several others, from the vault in the rear of the building. and placed it on or under a table, on the side of the office occupied by him, for the purpose of having those boxes convenient to be delivered to their owners during business hours, and for the purpose of saving the time that would be consumed in going to the vault for them when called for.

At this time, there was no one in the office, except the paying teller, who occupied the opposite side, with his back to the receiving teller, and who was engaged preparing and watching the money lying before him for the day's business. The front door was partly open, and the door to the office of the president of the bank, on the same side of the bank, that was occupied by the receiving teller, was not locked; and the door from the president's room leading into the bank, near the table, where the boxes were placed, was also unlocked.

In this condition of things, after placing the boxes on or near the table as before said, the receiving teller had occasion to go to the privy in the back yard, and was absent from the office ten or fifteen minutes. On his return, it was found that the box of the plaintiff had been stolen. No one, as before said, was in the bank, except the paying teller, who was occupied, with his back to the table, and the part of the office occupied by the receiving teller. It is probable that the thief or thieves entered the front door, and finding the receiving teller not at his place, and no one else in the office, except the paying teller, whose back was turned, they passed into the president's room, and from there into the bank through the unlocked doors referred to, and got the tin box of the plaintiff from the table, or the place where it was placed near the table, and made their escape with it, before the return of the receiving teller to the office.

It is shown that frequently the plaintiff, when depositing the box of an evening, saw it placed on the table referred to, and on one occasion he entered the bank and placed it there himself; but on such occasions there were always several clerks and other persons in the bank, so that there was little or no danger of thieves stealing it from the table where it was temporarily left.

The object of depositing the tin box was undoubtedly for the purpose of having it kept safely in the large vault, which the defendants had prepared for their customers, and where a thousand valuable boxes were kept every night.

The plaintiff had a good bank account with the defendants, and they doubtless found it profitable to receive cash deposits from their customers. It is not probable that the defendants prepared this large vault, the numerous metallic checks, and made such ample preparation to receive and take care of boxes containing valuable articles, scrips, bonds and marketable securities of every kind merely as an act of disinterested benevolence. On the contrary; it is shown that the owners of nearly all the boxes kept their currency deposited with the defendants; and we believe the object of this vault, holding out to business men a safe place to keep their valuable boxes, was to induce the deposit of money in the bank of the defendants.

Their object was doubtless to increase their deposits and, of course,

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enhance their profits; and to accomplish it they held themselves out to the business community as prepared to take care of their valuable boxes.

The taking care, therefore, of these boxes was a part of the business of the bank, by which they doubtless induced cash deposits and made considerable profits. We, therefore, do not regard the deposit in question as only a gratuitous one. Something more than no gross negligence or fraud was expected from the defendants. They were not merely gratuitous bailees, receiving a voluntary deposit, and liable only for "gross negligence or fraud;" they were bound to exercise such diligence as prudent bankers would exercise in taking care of and preserving a thing of that character deposited with them.

Even were the defendants only bound for gross negligence, we think they were grossly negligent in this case. "In determining what gross negligence is (says Judge Story) we must take into consideration what is the thing bailed. * * * Care and diligence are to be proportioned to the value of the goods, the temptation and facilities of stealing them, and the danger of losing them." And to illustrate it, he says: "If a bag of apples were left for a short time without a guard it would be no more than ordinary neglect, but if the bag were of jewels or gold, it would be gross negligence."

The box in question was very valuable; it was a great temptation to thieves coming into the bank, and finding the doors leading to it unlocked, and the receiving teller absent from his place, with no one to protect it, the paying teller being engaged in his own duties and his back turned to the box. We think it was gross negligence for the receiving teller to bring from the vault the tin box in question, and leave it unguarded, with the doors unlocked. And for this negligence the defendants, his employers, are responsible.

It is therefore ordered that the judgment herein be annulled; and it is further ordered that the plaintiff recover of the defendants \$8000 54, with legal interest thereon from tenth January, 1870, and costs of both courts.

ON REHEARING.

TALIAFERRO, J. From a re-examination of the facts of this case, we think it is shown that the deposit was a gratuitous one. Then the depositary is not to be held to that rigid accountability he would have been had the contract been one of hiring, or had the deposit been made at the request of the depositary, or solely for his advantage, or had it been expressly agreed that he should be answerable for all neglects. C. C. 2938. None of these conditions appear to have entered into the agreement of the parties in this case. "The depositary is bound to use the same diligence in preserving the deposit that he uses in pre-

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serving his own property." C. C., article 2937. We do not find that the depositary in this instance has failed to comply with the obligation imposed upon him by this article of the Code, nor can we say, from all the circumstances shown, that the loss arose from gross or inexcusable negligence on his part. The abstraction of the box seems to have been one of those bold and adroit acts which are occasionally carried out successfully in defiance of ordinary prudence and diligence. Being accomplished, its possibility is seen. Before it was attempted, its probability would scarcely have been conjectured. Seeing now how it might have been prevented, is no sound reason for contending that there was not proper diligence used to prevent it.

A review of the law and evidence of the case brings us to the conclusion that our former decree should be changed.

It is therefore ordered that the judgment first rendered by this court in the present case be annulled and set aside. It is now ordered that the judgment of the district court be affirmed, with costs.

Mr. Justice Wyly adheres to the original opinion.

No. 4644.

MARCEL GUIDRY v. J. JEANNEAUD & CO.

Where certain funds belonging to A were sequestered in the hands of B, his agent, at the suit of C, and said funds were paid to C, by virtue of a judgment which was not appealed from ;

Held—That the payment was good against A, who could not recover the amount from B, on the plea that he was not cited, and therefore was not bound by the judgment, because it was proved that he had ample notice and knowledge of the proceedings. He needed not the permission of B, his agent, and the garnishee in the suit, to appear in said suit, and could have appealed from the judgment, had he seen fit to do so. Under the circumstances of the case, as they appear in the record, B can not be forced to pay to A what he was compelled to pay to A's creditors by a court of competent jurisdiction.

A PPEAL from the Sixth District Court, parish of Orleans. *Leau-mont, J. Charles Louque*, for plaintiff and appellant. *J. A. Seghers*, for defendants and appellees.

TALIAFERRO, J. The defendants, in November, 1871, acting as the agents of the plaintiff, received for him, from the Queen's Insurance Company, \$4500. Of this sum the defendants, at the instance of and by the sanction of the plaintiff, paid out to different parties \$3900, leaving a balance of \$600 in their hands, and in relation to this balance arose the controversy forming the subject of this suit.

The defense is, that by a judgment of the Sixth District Court, rendered in favor of Blancand & Guitet, against them, commenced by sequestration, they were compelled to pay out of this balance of \$600 in their hands the sum of \$491 61, a debt owing by Guidry, the plain-

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tiff, to Blancand & Guitet; that they paid the costs of that suit, amounting to \$30 70, and the remainder, \$77 69, was allowed the defendants, by order of court, for attorney's fees, etc., incurred and paid by them as garnishees in the proceedings in court, and which they defended in the interests of the plaintiff. In the court below there was judgment in favor of the defendants, and the plaintiff appealed.

This case turns upon a question raised by a bill of exceptions in the record. The plaintiff objected to the introduction in evidence by defendants of the judgment of Blancand & Guitet, offered to show the disposal of \$491 61, a part of the balance of the \$600 in the hands of the defendants. The objection was that Guidry, the plaintiff, not having been a party to the judgment, was not bound by it. The court overruled the objection on the ground that the letter of Guidry's counsel, addressed to the defendants, Jeanneaud & Co, at the time the suit was instituted, and Guidry's receipt to the defendants, both of which are in evidence, sufficiently identify Guidry with the suit. The letter of the attorney is in these words:

"NEW ORLEANS, December 20, 1871.

"Messrs. Jeanneaud & Co :

"GENTLEMEN—At the request of Marcel Guidry allow me to inform you that he is not made a party to the suit brought by Blancand & Guitet against you before the Sixth District Court for the parish of Orleans, under No. 2886 of its docket; that the money sequestered and claimed is not the property of Messrs. Blancand & Guitet, and that said Marcel Guidry is not indebted unto them for the amount claimed. The interest of Marcel Guidry being solely at stake, with your permission, he will defend the suit so brought, and pay the expenses of court and of the attorney, relieving you from all responsibility. In case you fail to accept this proposition, or to defend the suit properly, the said Guidry will hold you personally responsible for all damages he may suffer in the premises.

"Very respectfully, your obedient servant,

"CH. LOUQUE, Attorney."

The receipt reads as follows :

"NOUVELLE ORLEANS, 27 Novembre, 1874.

"Reçu de Messieurs J. Jeanneaud & Cie. la somme de cinq cent cinquante piastres et quarante-et-un sous pour balance me revenant de mon assurance, moins six cents piastres que ces Messieurs gardent pour un (garnishee) de la maison Blancand & Guitet, et deux mille piastres pour la maison Rochereau & Co.

"(Signed)

M. GUIDRY."

It seems clear from the evidence that Guidry had full knowledge of the pendency of the suit of Blancand & Guitet, and that he had ample time to set up all the defenses in his power by appearing and defending himself in person.

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But it has been frequently held by this court that no valid judgment can be rendered against a party unless he has been legally cited; 21 An. 630, or voluntarily answers to the suit. Knowledge of the suit brought home to the defendant in any other way will not cure a defective citation; 19 An. 360. Guidry not having been made a party to the proceeding in which his rights were to be affected, no valid judgment could be rendered in that proceeding to affect those rights. 7 N. S., 161; 13 An. 374.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendants, Jean Jeanneaud and J. V. Cathalogne, *in solido*, the sum of six hundred dollars, with five per cent. interest per annum from the twenty-third day of November, 1871, and all costs of suit.

ON REHEARING.

MORGAN, J. Marcel Guidry, who resides in the parish of St. James, was entitled to receive a considerable sum of money from one of the insurance offices of this city. He appointed Jeanneaud & Co. to receive this money. It was paid to them. Guidry owed a number of parties in New Orleans; among others, Blancand & Guitet, to whom he addressed the following letter:

“ST. JACQUES, ce 1er Novembre, 1871.

Messieurs Blancand & Guitet :

Je viens de recevoir votre lettre. Veuillez, je vous prie, porter mon compte à Monsieur Jeanneaud & Cie., qui vous payera aussitôt que l'assurance lui aura payé. Tout à vous. M. GUIDRY.”

This letter was presented to Jeanneaud & Co. by Blancand & Guitet, and they promised to pay the sum due as soon as the insurance money should have been collected. Subsequently, however, Guidry countermanded these instructions, and Jeanneaud refused to pay. Thereupon Blancand & Guitet brought suit, and sequestered the money in Jeanneaud & Co.'s hands.

There was judgment ordering the sum claimed by Blancand & Guitet to be paid to them; from which judgment no appeal was taken. Under it Jeanneaud & Co. paid the money. It was objected to the introduction of this judgment, that Guidry was not properly cited, and was, in fact, no party to the suit. In a former proceeding, instituted on the eighteenth November, 1871, Blancand & Guitet proceeded against these funds in the hands of Jeanneaud & Co., by which they were enjoined from paying over this money to Guidry. Subsequently, to wit, on the twenty-seventh November, 1871, Guidry seems to have had a settlement with Jeanneaud & Co., as appears from the following receipt:

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"NOUVELLE-ORLEANS, 27 Novembre, 1871.

"Reçu de Messieurs J. Jeanneaud & Cie, la somme de cinq cent cinquante piastres et quarante-et-un sous, pour balance me revenant de mon assurance, moins six cents piastres que ces Messieurs gardent pour un (garnishee) de la maison Blancand & Guitet, et deux mille piastres pour la maison Rochereau & Cie.

"M. GUIDRY."

This proceeding seems to have been set aside, but the money still remaining in the hands of Jeanneaud & Co. was again proceeded against. It was in this proceeding that judgment was rendered in favor of Blancand & Guitet, and under which Jeanneaud & Co. paid. Of these proceedings Guidry had ample notice. His counsel, as is shown in the letter to Jeanneaud & Co., notified them that Guidry's interest alone was at stake, and that with their permission he would appear and defend the suit, otherwise they would be held responsible. He needed not the permission of Jeanneaud & Co. to appear in the suit; they could not have hindered him from doing so, had he liked; he could have appealed from the judgment, had he seen fit to do so. He did neither. Jeanneaud & Co. only paid a debt which he had acknowledged to be due, and the money for which he had left in their hands to pay. They paid only after they were ordered to pay by a court of competent jurisdiction, over them at least, and we do not think that under these circumstances they can be forced to pay to Guidry what they were compelled to pay Guidry's creditor.

It is therefore ordered, adjudged and decreed, that the judgment heretofore rendered by us be annulled, avoided and reversed, and it is further ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

No. 4328.

CHARLES A. M. POUTZ v. AUGUSTE REGGIO, BLANCHIN & GIRAUD,
Garnishees.

It has never been held that, to make a valid inscription of a conventional mortgage, an entire copy of the authentic act in which it is granted should be spread upon the public record. The object of registration is public notice, with reasonable certainty, of the substantial particulars of the mortgage; and when this is done, the purpose of the law is satisfied. The reinscription on the fourth of December, 1869, of a mortgage given in 1844, reinstated the inscription thereof, to take effect from the date of its inscription; and as this reinscription took place anterior to the plaintiff's judgment, it follows that when the mortgaged property was sold under that judgment, it was first subject to the payment of the mortgage debt.

APPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. E. Howard McCaleb*, for plaintiff and appellee. *Sambola & Ducros*, for defendants and appellants.

WYLY, J. In 1867, the defendant, Auguste Reggio, sold to the plaintiff one-half of his sugar plantation in the parish of Plaquemines.

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Subsequently there was a suit for partition, and the property was sold by order of court to effect the partition.

Out of the half of the proceeds coming to Auguste Reggio, the purchasers, Blanchin & Giraud, retained in their hands \$14,900, the amount of a conventional mortgage given by Auguste Reggio to his brother, Edmond Reggio, in 1844.

The plaintiff subsequently obtained judgment against Auguste Reggio, caused execution to issue, and garnishment process to be served on Blanchin & Giraud. They answered the interrogatories, stating: that they held this \$14,900, belonging to Auguste Reggio, in order to discharge the mortgage existing on the plantation in favor of Edmond Reggio; and that all the other funds of said Auguste Reggio, remaining in their hands at the time of the purchase, were paid over to him, and they are in no manner indebted to him.

The plaintiff then took proceedings to traverse these answers and to obtain judgment against said garnishees for the amount of his *fi. fa.*, making Octave Reggio, the curator of Edmond Reggio, who was interdicted, a party to the said proceedings.

The court came to the conclusion that the mortgage in favor of Edmond Reggio was perempted, and gave judgment requiring the garnishees to pay over to the sheriff the amount of the *fi. fa.* issued by the plaintiff.

The defendants and the garnishees objected to the form of the proceedings, and they contend that a revocatory action should have been resorted to, in order to set aside the mortgage and the judgment rendered thereon in favor of Edmond Reggio.

If the mortgage was never legally reinscribed since it was given in 1844, as appears by the evidence, it is without effect as to third persons, and it is no incumbrance on the property in the hands of the garnishees.

As to the plaintiff, and as to the garnishees, the mortgage of Edmond Reggio is without effect for want of reinscription, and the latter has no preference on the funds of Auguste Reggio retained in the hands of said garnishees. The plaintiff, who has acquired the privilege of a seizing creditor on the funds by reason of the garnishment process, had no cause to bring a revocatory action to set aside the mortgage of Edmond Reggio, which was dead as to him for want of reinscription.

We therefore conclude that the court did not err in rendering the judgment appealed from.

Judgment affirmed.

ON REHEARING.

MORGAN, J. On the twenty-fourth of November, 1871, Poutz obtained two judgments against Auguste Reggio, one for \$1047 75, with

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legal interest from judicial demand, and the other for \$6843 59, with eight per cent. interest from twenty-eighth December, 1867, less a credit of \$1500, paid on the second February, 1869.

Fi. fas. issued on these judgments, and Blanchin & Giraud were made garnishees, and interrogatories were propounded to them. They answer and deny being indebted to Auguste Reggio in any sum of money, or that they have any property of any description in their hands belonging to him. Their answers were traversed, and Pontz affirms that they are false. He alleges that Blanchin & Giraud held \$14,900 in their hands nominally to pay a certain mortgage and judgment in favor of Octave Reggio, in his capacity of curator to his brother Edmond Reggio, which sum is really the property of Auguste Reggio, his debtor; that the mortgage resulting from this judgment is null and void as against him; that when it, the mortgage, was reinscribed in 1869, it was barred by the prescription of ten and twenty years; that the consideration of the mortgage was the price of slaves, and therefore without validity; that the pretended judgment rendered in the suit of Octave Reggio, curator of Edmond Reggio v. Auguste Reggio, is also null and void, because the court which rendered it had no jurisdiction; because the proceedings were wholly *ex parte* and illegal; because it was rendered and signed at chambers, and out of term time, and was never read or entered upon the minutes of the court; because the judgment was rendered and signed on first February, 1871, while the petition praying for it was not filed until the fifth; that there was no suit pending when the judgment was signed, and that the subsequent filing of the petition could not give a retroactive effect to the judgment, which was of itself illegal; that the inscription of this judgment, its rendition and signature, was the result of a conspiracy and fraud between Octave Reggio, curator of his brother Edmond, Auguste Reggio, the defendant, and Blanchin & Giraud, the garnishees, for the purpose of putting Auguste Reggio's property beyond the reach of his creditors, and particularly to protect it against the claims of the plaintiff.

The evidence, consisting of the accounts between Blanchin & Giraud and Auguste Reggio, produced under a subpoena *duces tecum* obtained by the plaintiff, establishes that when the interrogatories were propounded, Auguste Reggio was in debt to Blanchin & Giraud. It also established that at that time Blanchin & Giraud held in their hands \$14,899 75, in the name of Octave Reggio, as curator of Edmond Reggio. The question which we have to decide is, to whom does this money belong? To Edmond Reggio or to Auguste Reggio? To make satisfactory answers to these questions, the facts upon which they are propounded, so far as they relate to the parties, must be stated.

The Pointe aux Chènes plantation, with the slaves thereon, was inher-

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ited by the Reggios from their father and mother. It was sold in order to effect a partition. Auguste Reggio purchased it for \$90,000. Among the children who inherited was Edmond Reggio, who was a minor at the date of sale. Auguste Reggio was his tutor. His interest in the succession of his parents amounted to \$14,899 79. Auguste Reggio became his debtor for that sum, to secure which a special mortgage and vendor's privilege was reserved on the plantation sold. The sale took place, and the mortgage was recorded about the first April, 1844. At that time Edmond Reggio, as appears from the testimony, was about twenty years of age. This mortgage, it is contended, was reinscribed on the fourth December, 1869.

Edmond Reggio has been all his life insane. He was interdicted by judgment of the court of his domicile on the fifteenth January, 1870. Octave Reggio, his brother, was appointed his curator. He is made a party to these proceedings by the plaintiff. On the first February, 1870, Octave Reggio, in his capacity of curator to Edmond Reggio, obtained judgment, in favor of his ward and against Auguste Reggio, for \$14,899 79, and his right of mortgage on the Pointe aux Chènes plantation was recognized. The suit was brought at the common domicile of all the parties, and in the parish where the property was situated. It was brought out of term time, and was decided in chambers, and upon the confession of the defendants. The petition upon which the judgment was rendered was not filed until the fifth February. On that day *fi. fa.* issued, and the property mortgaged was seized thereunder.

We must now return to the transactions between Auguste Reggio and Poutz, the plaintiff.

As we have before seen, Auguste Reggio became the owner of the plantation in question, subject to Edmond Reggio's mortgage, about the first April, 1844. He continued to be the sole owner thereof until the twenty-eighth November, 1867, when he sold the undivided half thereof to Poutz, the plaintiff, for \$35,000 cash. In this act of sale it is recited that the mortgage of Edmond Reggio rested on the property, and Auguste Reggio bound himself to have it released. This he never did. On the contrary, he caused it to be reinscribed, in December, 1869. It is thus apparent that in November, 1867, Poutz knew that the property which he purchased was encumbered with a mortgage in favor of Edmond Reggio. On the sixteenth December, 1869, Poutz obtained a judgment against Auguste Reggio for the partition of the plantation (Pointe aux Chènes), held in common between them. In obedience to this judgment, the plantation was sold on the fifth February, 1870. It was on this day that Octave Reggio, curator, issued execution under the judgment which he had obtained against Auguste Reggio. The plantation was sold under the two *fi. fas.*, and was pur-

chased by Blanchin & Giraud. The curator dispensed the purchasers from paying the amount due to his ward in cash. At this sale, the purchase price was \$47,000.

The purchasers reserved in their hands an amount sufficient to pay some incumbrances which rested upon the property, and about which there is no dispute, and paid to the sheriff \$14,320 in cash, being the amount coming to Pontz. They also reserved \$14,899 79 "with which to satisfy the privilege and mortgage of Edmond Reggio." All of which appears to have been done with the knowledge and consent of Pontz. Thus, when he purchased his interest in the Point aux Chènes plantation, he knew that it was incumbered with Edmond Reggio's privilege and mortgage; and, when it was sold, he knew that the debt which it was given to secure remained unpaid. Although the amount which he had paid for his share of the plantation largely exceeded the debt due by his vendor to Edmond Reggio, and although his vendor had agreed to cause the mortgage by which it was secured to be released, he took no steps to compel him to comply with his contract. Thus he was reckless in purchasing property which was incumbered at the time of purchase, and careless in not seeing to it that the incumbrance was removed when he had the opportunity to do so. If he suffers, he has himself alone to blame. The first question which we are called upon to decide is, whether or no the reinscription of the mortgage of the first April, 1844, on the first December, 1869, reinstated it. Plaintiff contends, first, that it was not reinstated in the manner required by the law; and, second, that it was barred by the prescription of ten and twenty years.

First—The mortgage is to be found, first, in the act of sale and partition between the heirs of the first April, 1844, in which the property is fully described, and in which it is declared: "Pour la part des mineurs Edmond et Octave Reggio, s'élevant à la somme de \$29,790 50, le dit sieur acquéreur, en sa qualité de tuteur en prend charge. Pour garantir le paiement des dix billets ci-dessus décrits à leur échéance respective et l'avoir des dits mineurs Edmond et Octave Reggio, dans le produit de cette vente, l'habitation et les esclaves, objets de la présente vente, sont et demeurent spécialement hypothéqués, ainsi que pour tout intérêt éventuel qui pouvait résulter du non-paiement des dits billets et de l'avoir des dits mineurs.

On the same day a distinct mortgage on the same property was separately inscribed in the office of the Recorder of Mortgages, in book 4, folio 241, No. 860.

On its face the mortgage is preempted by the lapse of time. The curator, however, contends that it was reinscribed in the manner and form required by law.

For the plaintiff it is contended that the only evidence of its rein-

scription is to be found in the following entry made by the Recorder immediately under the original deed, in book D of 1844, viz: "Reinscribed at the request of Mr. Auguste Reggio, this fourth day of December, 1869;" signed, E. Butler, Recorder. This, he says, amounts to nothing. Of this opinion was the District Judge, and of the same opinion were we when the case was first presented to us, and so thinking we gave judgment in favor of the plaintiff. Upon the law, applied to this state of facts, our minds have undergone no change. But a further examination has satisfied us that we, as well as the District Judge, erred as to the facts.

The original mortgage, which is contained in the act of sale and partition, and in which the debt due to the minor and the mortgage given to secure the same, is specifically set forth, and in which the property mortgaged is fully described, was recorded on the first of April, 1844. Another recital of the same mortgage in which the debt due the minor and the property are described at length, and identified with the first act, was recorded on the same day in book 4, folio 241, No. 860. The reinscription was made on the fourth of December, 1869, in book D, No. 1708, folio 78. The two first named acts are in the French language, the third is in English. It commences: "Auguste Reggio, in favor of Edmond Reggio, as per act passed before Gilbert Leonard, then Parish Judge and *ex-officio* notary public in and for this parish, on the first day of April, 1844, to secure full and punctual payment of the sum of \$14,899 79, being the share or portion accruing to said minor from the succession of Nicholas Reggio and Caroline Jorda, his deceased father and mother, specially mortgaged and hypothecated in favor of said minor." And here follows the description of the property, which description is a literal copy of the one in the act of the first of April, 1844, except as to the slaves which are not mentioned at all; as they did not exist at the time, there was no need to mention them. It was in fact the reinscription of the mortgage of 1844, and the recital of the Recorder that it was reinscribed at the request of Auguste Reggio, refers to the act of reinscription and not to the original mortgage. It can mean nothing else, as it is not found on the margin of the act of 1844, and is only found in the act of reinscription of the fourth of December, 1869. It is urged that under the decision in *Shepperd v. Cotton Press*, 2 An., the reinscription was not made in accordance with the law, because the entire act in which the mortgage is contained is not copied in full.

"It has never been held, that to make a valid inscription of a conventional mortgage, an entire copy of an authentic act in which it is granted should be spread upon the public record. The object of registration is public notice, with reasonable certainty of the substantial particulars of the mortgage; and when this is done, the purpose of

the law is satisfied. Suppose a mortgage creditor should go to the mortgage office and verbally state to the recorder all the essential particulars of the authentic act of mortgage or judgment under which he claimed, and the recorder, instead of requiring a copy of the act or judgment, as he might do (articles 3330, 3331), should inscribe the particulars as stated; this would be good. Such is the spirit of what we held in *Ellis v. Sims*, 2 An. 254;” *Bonnafé v. Lane*, 5 An. 225. The case supposed by Mr. Justice Slidell in the decision just quoted is the case at bar, except that here it is the debtor who acknowledges the debt and causes the inscription, instead of the creditor, and causes to be stated in full the original amount by him due, and describes critically the property mortgaged to secure its payment.

In the succession of Pate, 6 An. p. 242, Mr. Justice Slidell again said: “The principal objection to the sufficiency of the registry is that they did not cause the acts of mortgage to be inscribed in full, but merely inscribed certificates of the parish judge before whom the mortgages were executed, in which, respectively, he certifies that an act of mortgage had been executed before him, the material and substantial details of which are stated. * * * We have hitherto said that the object of registration is public notice, with reasonable certainty; and we can not sanction a construction which would avoid the registry of a mortgage upon the ground that the entire deed of mortgage was not spread *verbatim* and *literatim* upon the public records.”

In *Rogers v. Chander*, 6 An. 349, it was said: “It has been held in relation to the inscription of mortgages that although the law requires a copy of the act offered for record to be presented to the recorder of mortgages, it is not indispensable to the validity of the inscription that the entire act should be copied in the books of the recorder; and that a declaration that the mortgage exists, with a statement of dates and amounts, and a full description of the property, are sufficient.” These cases were all determined by the court which decided the *Shepherd* case, and are not considered as interfering with the doctrine of registry as laid down in that case. With them before us, we think we may say that in deciding that where a tutor causes the mortgage he has given in favor of one who has been his ward to be reinscribed—the reinscription containing the date of the debt, and the amount thereof in principal, together with a description of the property subject to the mortgage upon the books of the recorder of mortgages, the law has been complied with—we are only following the line of safe precedents which has been marked out by our predecessors, whose opinions upon this subject entirely agree with our own.

Second—Was the debt, which the mortgage was given to secure, prescribed at the time the mortgage was reinscribed?

That it existed at one time is not disputed. That Poutz knew it, is apparent from the fact that it is recited in the deed by which he became part owner of the property which was mortgaged to secure its payment. Auguste Reggio swears that he constantly acknowledged this debt. Octave Reggio swears to the same thing. They both swear that it was often acknowledged in the presence of Poutz; and this evidence is not contradicted. This constant acknowledgment kept the debt alive. The reinscription of the mortgage of 1844, on the fourth December, 1869, re-established the inscription, to take effect from the date of its reinscription; and as this reinscription took place anterior to Poutz' judgment, it follows that when the property was sold under that judgment, it was first subject to the payment of this debt.

The next objection to the mortgage is, that it was given to secure the price of slaves, and is therefore immoral, illegal and without any validity whatever. Counsel for Edmond Reggio admits that the debt in question was partly the price of slaves—that is to say, to the extent of one-third of the amount. But he contends that the question of consideration of the sale of slave property is finally settled in favor of the bearer of such claims by the decisions of the Supreme Court of the United States, in the cases of *White v. Hart* and *Osborn v. Nicholson*, 13 Wallace, 647, 654. The interests of the parties in the case before us do not make it necessary that we should discuss this question.

Since the year 1855, all debts bear interest at the rate of five per cent. per annum. The relative price of the slaves on the Pointe aux Chènes plantation to the land was, as it is established by the testimony, one-third for the slaves, two-thirds for the land. The price of the land, therefore, would be about \$13,000. The interest on this sum at five per cent., since 1855 to the day of sale to Blanchin & Giraud—fifth February, 1870—makes the debt due on the land alone far exceed the amount in the garnishees' hands. This law we feel bound to apply to the protection of the litigant before us, although it has not been invoked in his behalf.

The conclusions we have arrived at upon these points make it unnecessary for us to consider the question of the validity of the judgment obtained by Octave Reggio, curator, against Auguste Reggio; and so we are enabled to prevent the ruin of one who, once a minor, under a tutor, and always an insane person, and thus doubly the ward of the courts and entitled to their protection, without being called upon to review the settled jurisprudence of the State with regard to what is termed the slave consideration in contracts, and without changing in any manner our own decisions upon the subject of the reinscription of mortgages.

It is therefore ordered, adjudged and decreed that the judgment heretofore rendered by us be avoided, annulled and reversed. And

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it is now ordered, adjudged and decreed that the judgment of the District Court be avoided, annulled and reversed, and that there be judgment in favor of the garnishees, Blanchin & Giraud, and Octave Reggio, curator of Edmond Reggio, and that plaintiff pay costs in both courts.

No. 2986.

PHILIP DRUMM v. HANNA, HITCHCOCK & SEWELL.

Were it admitted that a partner can shield himself from responsibility by publishing that he will not be responsible for debts contracted by his copartners in the interest of their common venture, still the notice, even if sufficient, must be brought home to the party who contracts on the responsibility of the firm. His telling his partners that he would not be responsible, does not affect the plaintiff, who was not notified.

Under such circumstances, a copartner, who stood by and saw, without objections, a work done which was necessary for the prosecution of the business in which he was engaged, is bound to pay for it.

A PPEAL from the Seventh District Court, parish of Orleans. *Col-lens, J. Cotton & Levy*, for plaintiff and appellee. *Race, Foster & Merrick*, for Hanna, defendant and appellant.

MORGAN, J. We consider it established that the defendants were partners, carrying on a distillery near the bank of the Mississippi river. Sewell was the superintendent thereof. The distillery obtained its supply of water by means of a pipe which led to the river. This pipe was liable to be broken by steamboats, drift logs, etc., which were constantly passing.

It was considered necessary to protect this pipe. This was done by the plaintiff, who drove piles about and around it. The work was done at the instance of Sewell. Plaintiff charged one thousand one hundred dollars for it. Payment has been demanded and refused. He brings this suit to recover the amount due him. The work, it is proved, is worth the sum charged.

There was judgment against all the defendants.

Hanna alone has appealed. He denies the partnership; denies his liability; and protests that he can not be held liable, because he had notified the public that he would not be responsible, or pay any bills contracted in his name, without his written order.

The notice does not allude to the partnership existing between the parties, or mention the names of the copartners.

Assuming that a partner can shield himself from responsibility by publishing to the world that he will not be responsible for debts contracted by his copartners in the interest of their common venture—upon which it is not necessary that we should express any opinion—still it is evident to our minds that the notice, if sufficient, must be brought home to the party who contracts on the responsibility of the

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firm. In this case, it is not shown that Drumm knew that any such notice had been published. Even if it had been, Hanna was present when the work was being done; he made no objection thereto; on the contrary, we think the testimony shows he acquiesced in it. True, he told his copartners that he would not be responsible for the amount to be paid, but to bind the plaintiff, he should have notified him. This he did not do. As he stood by and saw the work done without objection, and as the work was necessary for the prosecution of the business in which he was engaged, he is bound to pay for it.

Of this opinion was the District Judge, and we agree with him.
Judgment affirmed.

Rehearing refused.

No. 4337.

SUCCESSION OF J. M. CABALLERO.—Oppositions of Charles Maduel,
Dative Testamentary Executor, et als.

25	646
51	605
25	646
124	758

The account rendered to the heir being a copy of the one previously homologated, contradictorily with the creditors, is *prima facie* correct.

If the items thereof were exorbitant and undue, the opponents should have administered proof to overcome the presumption of correctness existing in favor of the accountant by reason of the judgment of homologation. This has not been done. Illegal charges however apparent on the face of the record, can be corrected.

An executor can not keep in his hands the funds which, according to law, he was bound to deposit in bank, on the plea of retaining only the amount of a legacy due to him, when the testamentary disposition in his favor, by the express terms of the will, was to be discharged out of a particular fund in Havana, Island of Cuba, of which he had not the seizin. The funds in controversy in this case were not derived from that source, and ought not to have been retained and used by the executor.

The sureties of the executor not having been cited and not appearing in this suit, the judgment rendered against them was annulled on rehearing.

A PPEAL from the Second District Court, parish of Orleans. *Durigneaud, J. G. L. Bright*, for dative testamentary executor and appellants. *A. Voorhies*, for Martinez et als., appellees.

WYLY, J. In February, 1872, this court decided that Maria Dolores Felicite Caballero, wife of Joseph Maria Conte, was the legitimate daughter and sole heir at law of J. M. Caballero; annulled the will of said Caballero of date the twenty-first of March, 1852, and ratified in January, 1856, and ordered the dative testamentary executor to render a full and complete account of his administration. F. P. Martinez, the dative testamentary executor, who had previously resigned, rendered his account, crediting the succession with \$16,692, the amount of funds on hand and collected, and debiting it with charges amounting in the aggregate to \$10,733 26.

To this account, Charles Maduel, the present dative executor, and Mrs. Conte, the sole heir at law, made opposition, disputing every item charged against the succession, and alleging that the said account does not contain a correct statement of the receipts and disbursements

Succession of Caballero.

of said executor; that the accountant never paid, or was authorized to pay, the items with which he credits himself, the same being illegal, exorbitant and undue by the succession, ought not to be charged against it; that said executor is not entitled to any commissions, because his services have resulted in nothing but injury to the estate.

The opponents further show that the said executor received \$16,692, of which \$2157 50 was in gold, and did not, in compliance with law, deposit said moneys in a chartered bank and keep in his official capacity a bank book, consequently he is liable and should be condemned, jointly and severally with his sureties, to pay to said estate twenty per cent. per annum interest on said amount not so deposited, from the twenty-sixth day of November, 1866, until final payment; that he has not used proper diligence in collecting certain claims due the estate, amounting in the aggregate to \$17,904 55, and by his neglect and inattention he has caused the estate to lose that amount, for which he becomes liable; and that he has utterly failed and neglected to rent a valuable residence belonging to the estate on St. Louis street, causing a loss of \$1800, for which he is also liable. The court dismissed the oppositions and permitted the accountant to retain the balance of the money, for which he credited the estate, as a payment on the legacies made to him and his children by the will of Caballero. From this judgment the opponents appeal.

The account rendered to the heir being a copy of the one previously homologated, contradictorily with the creditors, is *prima facie* correct.

If the items thereof were exorbitant and undue, as alleged, the opponents should have administered proof to overcome the presumption of correctness existing in favor of the accountant by reason of the judgment of homologation. This has not been done.

There are several items of the account, however, that we can correct:

First—The charge of \$50, reserved for future costs for the clerk; as the executor has resigned, the succession should not be charged therewith in his account.

Second—The item of \$100, for affixing and removing seals, is illegal, the law only allowing \$3 to the notary for such service. It must be reduced to the sum mentioned.

Third—Inventory and supplemental inventory and copies, \$605; this charge should be reduced to \$25; the inventories being before us, and the law fixing the fees of notaries.

Fourth—The item of \$3000, to P. Soulé and L. Charvet for attorneys' fees, should be reduced to \$500; the extent of their professional labors appearing in the transcript, and the court being authorized to determine the value of their services.

Fifth—The item of \$1000, to Q. A. Thomas, attorney of absent heirs, should be reduced to \$100.

Sixth—The item of \$300, charged for the services of appraisers, should be reduced to \$16, the amount to which they were entitled under act No. 33 of the statutes of 1870.

Seventh—The items due to Ferrer, Gonzales and Bances, amounting in the aggregate to \$1012 70, should be stricken from the account, as the proof is they have not been paid by the accountant.

Eighth—The item of \$1331 59, charged as the executor's commissions, should be stricken from the account. From the record before us, and in view of the illegal and exorbitant charges he has permitted to be allowed against the estate, we are satisfied that his administration has been an injury rather than a benefit to the succession. 4 An. 578.

Actually administering \$16,692, this executor has presented charges amounting to some \$9000, consisting almost entirely of funeral charges, attorneys' fees, his own commissions, clerks' fees, notary and appraisers' costs, and auction charges.

Instead of renting out the residence belonging to the estate, inventoried at \$30,000, he permits it to lie idle, and sets up charges for a keeper amounting to \$246. An executor so remiss and positively unfaithful in the discharge of his duties, deserves no remuneration for his services.

The charges, therefore, for fixing seals, inventories, attorneys' fees and appraisers' costs, should be reduced from \$5005 in the aggregate to \$644 in the aggregate. While the sum retained for future costs of the clerk, the executor's commissions, and the items charged as due to Ferrer, Gonzales and Bance, amounting in the aggregate to \$2394 29, should be stricken from the account. \$6755 29 should, therefore, be deducted from the \$10,733 26 with which the executor credits himself in the account. This leaves the total charges \$3977 97, which, deducted from the \$16,692, funds belonging to the estate in the hands of the executor, leaves \$12,714 23 due by him. This sum the executor should pay over to the opponents, with twenty per cent. per annum interest, because he failed to keep the same deposited in a chartered bank of this State, according to law. (Revised Statutes of 1870, p. 8, sec. 7.) The executor, however, contends that he was not bound to deposit this sum in bank, because under the will there was a legacy to him, in discharge of which he had the right to retain the funds in controversy. In support of this position he cites articles 1627 and 1628 of the Revised Code.

Article 1627 is not applicable, because the "thing bequeathed" was not in his possession at the opening of the succession. He acquired the funds in controversy subsequently, in his fiduciary capacity.

Article 1628 permits the testamentary executor, having seizin of the effects of the succession, to retain in his possession the amount of the legacy due him, subject to a restitution for the payment of debts.

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The accountant, however, was not a testamentary executor; he was only a dative executor. Assuming, however, that he had the right accorded by article 1628, this executor could not retain the funds in controversy, because the disposition in his favor, by the express terms of the will, was to be discharged out of a particular fund in the hands of Juan A. Bance, in Havana, Cuba. The funds in controversy were not derived from that source, and ought not to have been retained and used by the executor.

As to the claims for damages against the executor, for failing to collect the several sums due the estate and for failing to rent out the residence, we will remark that the opponents have not adduced sufficient proof to fix his liability.

It is therefore ordered that the judgment appealed from be annulled, and it is now ordered that the opponents recover judgment against the accountant, F. P. Martinez, for ten thousand five hundred and fifty-six dollars and seventy-three cents, payable in currency, and the further sum of twenty-one hundred and fifty-seven dollars and fifty cents, payable in gold (the amount inventoried as belonging to the succession); and it is further ordered that there be judgment against said F. P. Martinez and his sureties, jointly and severally, for twenty per cent. per annum interest on twelve thousand seven hundred and fourteen dollars and twenty-three cents, from the twenty-sixth day of November, 1866, till paid.

It is further ordered that said Martinez pay costs of both courts.

Revised Code 1191, 1674; Revised Statutes of 1870, section 1465; Verret v. Aubert, 6 L. 353; 14 An. 707; Revised Code, Art. 1150; 6 An. 427; 9 An. 412; 12 An. 445.

ON REHEARING.

LUDELING C. J. In the decree of this court rendered on the thirteenth of January, 1873, the securities of the executor were condemned to pay twenty per centum damages, under the penal statute of the State, because the executor had failed to deposit moneys collected by him as required by the law. R. S. p. 8, sec. 7.

Our attention was called to the fact that the securities were not parties to this suit, and for that reason we granted a rehearing.

The securities were not cited, nor have they appeared in the suit; the judgment against them in this suit was, therefore, improperly rendered. 6. N. S. 635; 3 La. 434; 9 An. 85.

It is therefore ordered that so much of the decree of this court heretofore rendered in this case, as condemns the securities of the executor to pay the damages aforesaid and costs, be annulled, and that in other respects the decree remain undisturbed.

No. 4631.

CITY OF NEW ORLEANS v. SALAMANDER INSURANCE COMPANY.

Each proviso, the one in section 15 of act No. 42, approved March 3, 1871, and the other in section 15 of act No. 14, approved March 5, 1872, refers simply to the license tax, and not to taxation on the property, capital, etc., of insurance companies.

Under the act of 1871, the payment of \$1000 as a license, and of one per centum on the premiums earned from policies issued through agencies in the State, in addition to said license, will exempt the company from any other license for doing business throughout or in any part of the State—the one per centum being considered sufficient from the agencies in the State, and the \$1000 from the mother company.

The act of 1872 treats only of the subject of licenses, and is limited to that only.

When a law is susceptible of two constructions, the one which will give effect to the law, rather than the one which would render the law unconstitutional, must be adopted.

APPEAL from the Superior District Court, parish of Orleans. *Hawkins, J. Roselius & Philips*, for defendant and appellant. *G. S. Lacey*, city attorney, for plaintiff and appellee.

HOWELL, J. The only question for decision in this case is, according to the statement of facts, “whether the Salamander Insurance Company could be taxed for the payment of any municipal tax whatever—said company having paid to the State the license tax of \$1000, called for under paragraph No. 15, section No. 3, of act No. 42, of the Legislature of Louisiana, approved March 3, 1871, and paragraph No. 15, section No. 1, of act No. 14, approved March 5, 1872, during said years 1871 and 1872.”

The portions of said acts applicable to the question are as follow:

Section 3 (act 1871). “That there shall be levied and collected an annual amount as a license or tax:

Fifteenth—“From each insurance company with a capital of one hundred thousand dollars or more, incorporated by or under the laws of this State, and transacting an insurance business therein, one thousand dollars; * * * * *provided*, that no insurance company whose license tax shall be one thousand dollars shall be liable to any assessment throughout the State other than that imposed by this article and by section six of this act.”

Section 6. “That from every insurer or insurance company transacting an insurance business in this State, there shall be collected, in addition to the licenses in such cases hereinbefore provided for, an annual tax of one per centum upon the gross amount of the premiums earned each year from policies issued through agencies in the State.”

Section 1 (act 1872). “That there shall be levied and collected an annual amount as a license or tax:

Fifteenth—“From each agent or representative of an insurance company, by or under the laws of this State, and transacting an insurance business therein, one thousand dollars; * * * *provided*, that no insurance company whose license tax shall be one thousand dollars, shall be liable to any assessment—State, parish or municipal through-

out the State—other than that imposed by this article and by section six of this act.”

Section six of this act simply makes the act take effect from and after its passage.

Notwithstanding the above legislation, the city of New Orleans, in the years 1871 and 1872, imposed a tax upon the defendant under the head of “Merchandise, Capital and Money at Interest.”

Upon examining the above statutes, we have come to the conclusion that each proviso refers simply to the license tax, and not to taxation on the property, capital, etc., of insurance companies. Under the act of 1871, the payment of one thousand dollars as a license, and of one per centum on the premiums earned from policies issued through agencies in the State, in addition to the said license, will exempt the company from any other license for doing business throughout or in any part of the State, the one per centum being considered sufficient from the agencies in the State, and the one thousand dollars for the mother company.

The act of 1872 treats only of the subject for licenses, and is limited to that one subject.

When a law is susceptible of two constructions, we will adopt the one which will give effect to the law, rather than the one which would render the law unconstitutional.

Judgment affirmed.

Rehearing refused.

No. 4394.

MRS. A. M. JENNINGS v. MRS. F. M. McCONNICO.

No appeal is to be entertained from an order allowing an intervenor, as owner, to bond property provisionally seized. The right to do so is expressly conferred by law (section 2915 R. S.); and the judge *a quo* had no discretion but to grant the order—the bond furnished taking the place of the property released. There can therefore be no irreparable injury resulting from the granting of the order, and the law has provided ample remedy in case the order should not be properly executed. An appeal would be without practical benefit.

APPEAL from the Fourth District Court, parish of Orleans. *Théard*, J. *B. R. Forman*, for plaintiff and appellant. *E. H. Huntington*, for sub-lessee, John P. Fowler, defendant and appellee. *H. W. Handlin*, for C. R. Poole, intervenor and appellee. *M. M. Cohen*, for Louis Grunewald, intervenor and appellee. *E. Filleuil*, for C. S. Sauvinet, civil sheriff.

HOWELL, J. The plaintiff sued the defendant for rent, and caused the furniture in the leased premises to be provisionally seized. Three parties, J. P. Fowler, E. R. Poole, agent, and L. Grunewald, intervened separately, and obtained orders to release the property severally claimed by them. The plaintiff appealed from the said orders, and

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also from a judgment on a rule taken by her to rescind the order in favor of said Fowler.

Grunewald and Fowler move to dismiss the appeal from the orders or judgments in their favor, on the grounds:

First—That the claim of said Grunewald is for a piano shown to be worth only \$200.

Second—The judgment, making absolute the rules to bond, is interlocutory, and does not work an irreparable injury.

I. The first ground is well taken, and the appeal, as to Grunewald, must be dismissed. The proceeding can not be likened to a *concursum*, in which the value of all the property gives jurisdiction; but is simply a separate demand, made by a third party intervening, who claims to be the owner of specific property under seizure, and it is the amount of his demand, or the value of the property claimed by him, which is the matter in dispute, and this is below \$500. Had he failed in his demand to bond, it is clear that he could not have appealed, and having succeeded, his opponent or antagonist can not appeal for the same reason, the matter in dispute not exceeding \$500.

II. The second ground presents more difficulty, but we are constrained to apply the doctrine repeatedly recognized by this Court, that where the party is compelled to resort to another suit to obtain redress, the injury caused by an interlocutory order must be held to be irreparable, and to maintain the appeal as to J. P. Fowler, whose claim is over five hundred dollars. See 23 An. 51 and the cases there cited. The plaintiff, in this instance, if successful, will have to pursue Fowler on the bond of release, which takes the place of the property seized and released.

It is therefore ordered that the appeal, as to Grunewald, be dismissed, at the costs of appellant; and, in other respects, the motion to dismiss is overruled.

ON REHEARING.

HOWELL, J. A rehearing was granted in this case, because we doubted the application, in this instance, of the doctrine that where the party is compelled to resort to another suit to obtain redress, the injury caused by an interlocutory order must be held to be irreparable, and an appeal allowable.

After further reflection and examination, we conclude that it should not be applied in this case, where the plaintiff has appealed from an order allowing an intervenor, as owner, to bond the property provisionally seized herein. The right to do so is expressly conferred by law (sec. 2915 R. S.), and the judge, it would seem, had no discretion but to grant the order, the bond furnished taking the place of the

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property released. There can, therefore, be no irreparable injury resulting from the granting of the order. The law has provided ample remedy in case the order should not be properly executed. An appeal would be without practical benefit, as we would likewise have to recognize the right of the intervenor and mandate of the law.

It is therefore ordered that our decree herein, so far as it maintains the appeal of J. P. Fowler, be set aside, and that the said appeal be dismissed, with costs; and that, in other respects, the said decree remain undisturbed.

MORGAN, J. This case is now before us on its merits.

The appellant has assigned no errors in the judgment appealed from; has filed no brief; made no argument. We can not say that the district judge erred.

Judgment affirmed.

No. 4787.

STATE OF LOUISIANA, ex rel. Mrs. Sarah Richardson, v. THE JUDGE
OF THE FOURTEENTH JUDICIAL DISTRICT COURT.

When an injunction issues against an order of seizure and sale, and a suspensive appeal is taken from the judgment dissolving the injunction, the amount of the bond must be measured, not by the amount involved in the injunction suit, but by the amount of the judgment ordering the seizure and sale staid by the injunction.

A judgment dissolving an injunction against an order of seizure and sale without damages is simply a judgment of nonsuit, and seems naturally to blend itself with that ordering the sale; or, in other terms, it is in substance a repetition of the order first granted.

It is not considered that the import of a suspensive appeal in such a case has any other effect than that of suspending the original order of sale. The judgment dissolving the injunction does not constitute a separate, independent judgment, that could be appealed from for any other purpose than that of affecting the original order of seizure and sale.

APPPLICATION for a writ of mandamus, directed to *Robert Ray*, Judge of the Fourteenth Judicial District Court. *Barrow & Pope* and *Morrison & Farmer*, for relator. *Robert Ray*, in *propria persona*.

TALIAFERRO, J. A creditor of the relator having obtained an order of seizure and sale against her property, she enjoined the execution of the writ, alleging various grounds for the proceeding. The injunction was dissolved, and the relator moved the court for a suspensive appeal, tendering a bond with surety for five hundred dollars to cover costs. The court ordered that a devolutive appeal be granted her on giving bond in the sum of one hundred dollars, and a suspensive appeal on furnishing bond in the amount required by law. The relator thereupon applied to this court for a writ of mandamus, directed to the Judge of the Fourteenth District, commanding him to grant the suspensive

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appeal applied for on bond of five hundred dollars. A rule *nisi* was granted, returnable before this court on the first Monday of November, 1873, and all proceedings in the case staid in the lower court.

To this rule the judge *a quo* answers :

First—That the proceeding entitled Sarah Richardson v. B. H. Dinkgrave, Sheriff, et al., is not by law an independent suit or proceeding coupled with the conservatory writ of injunction, as contemplated by Code of Practice, articles 296 *et seq.*, which is instituted by petition, oath and bond; but is, in its nature and all its bearings, an opposition and answer to the petition for order of seizure and sale. 4 La. 89; *ib.* 293; 3 Rob. 347.

Second—That the doctrine enunciated in the case of the State, ex rel. Stackhouse, v. the Judge of the Fourth District Court of New Orleans, 21 An. 152, referred to in the rule *nisi* granted by this court against respondent, and the ruling in that case, does not conflict with the judgment and ruling of respondent in the present case, for the reason that the relators, Stackhouse et al., in 21 An. p. 152, obtained an injunction upon giving bond with security for \$1000; that Zunts filed an answer, praying for a dissolution of the injunction; whereas, in the case at bar, Mrs. Richardson did not obtain an injunction upon giving bond in any amount, claiming the benefit of article 739 of the Code of Practice, to sue out her injunction or opposition without giving bond.

Third—That Mrs. Richardson having failed to sustain the allegations in her petition, when called on by plaintiff by rule to do so, respondent regarded the fiat or orders issued by him in the proceeding as the only judgment extant in the case, and that in order to obtain an appeal the amount of the judgment in the case of Pargoud v. Richardson must govern. While the law grants to creditors having title importing confession of judgment the right of executory process to seize and sell the property of their debtors summarily, it accords to debtors protection against injury and inconvenience they might otherwise suffer from an undue and improper exercise of that right on the part of creditors. Accordingly it presents specifically by article 739 of the Code of Practice the only grounds upon which a sale of property, seized under executory process, may be arrested. Articles 738 and 740 grant the debtor the ready means of preventing an improper sale of his property, by swearing to the alleged fact authorizing a suspension of the sale, and may obtain his injunction without giving security. Article 741 then declares that: "The plaintiff against whom the injunction has been obtained, may compel the defendant to prove, in a summary manner before the judge, the truth of the facts alleged in his opposition." And article 742 proceeds: "If, on being thus required, the defendant proves that the action on which the seizure

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has been obtained is extinct or prescribed, or that the cause of it is void, or that the debt on which it is founded is paid, remitted or compensated, the judge shall revoke the order of seizure and condemn the plaintiff to pay costs." Article 743 follows, announcing that "if the defendant does not prove the truth of the facts alleged in his opposition, or if it appears that he has paid, or can plead in compensation for only a part of the debt, the judge shall dissolve the injunction he has granted, and the sale of the property shall proceed, either for the whole debt or for a part, as the case may be."

The terms of this article are peremptory, that, upon the dissolution of the injunction, the sale shall proceed. It assumes that the party has exercised the liberal right accorded to him of suspending the sale by injunction without giving security—that he has been heard by the judge and the grounds for his injunction found to be frivolous and not warranted by law. We find nothing in the entire chapter, treating of executory process, that justifies the inference that a defendant, in an order of seizure and sale, is to be indulged further in delaying his creditor in the enforcements of his rights without affording him indemnity against contingent injury and loss that might arise from delay. The judgment in the case at bar, dissolving the injunction without damages, is simply a judgment of nonsuit, and it seems naturally to blend itself with that ordering the sale, or, in other terms, it is in substance a repetition of the order first granted. We do not readily see the import of a suspensive appeal in such a case as having any other effect than that of suspending the original order of sale. Disconnected entirely from that order, a suspensive appeal from the order dissolving the injunction would be nugatory. The judgment dissolving the injunction would not constitute a separate, independent judgment that could be appealed from, for any purpose other than that of affecting the original order of seizure and sale. We have not found a case in our jurisprudence where a suspensive appeal, from a judgment dissolving an injunction taken out to suspend the execution of a writ of seizure and sale, has been taken on a mere nominal bond for costs. In the case on which the relator more especially relies, that of the State, ex rel. W. and H. Stackhouse, v. The Judge of the Fifth District Court of New Orleans, 21 An. 154, security was given for one-half over and above the sum awarded as damages and costs, which made the bond about \$20,000.

We are not inclined, after further consideration of the law and the several decisions bearing on the prominent point in the case before us, to adhere to all the views we expressed in the Stackhouse case just referred to. We find that these views are not sustained by the previous decisions, and we regard them as antagonistic to the case of *The State v. The Judge of the Third District* (18 La. 444), which we now

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consider embodies the true interpretation of the articles of the Code of Practice bearing on the subject.

The case of *The State v. The Judge of the First District* (19 La. 167), was where the injunction in the first place was, not to restrain the execution of an order of seizure and sale, but to prevent an order of seizure and sale from issuing—the party giving a bond for \$20,000. Subsequently, on rule, this injunction was dissolved with damages. An appeal from the order dissolving the injunction was taken on a bond of \$6000. Afterwards, on the trial of the injunction on its merits, a judgment of nonsuit was rendered against the plaintiff, from which he appealed—giving bond to cover costs only. The court regarded the appeal as suspensive, but it went on to say: “We know of no law that requires a plaintiff in injunction, who has given his bond to secure the damages which may be sustained by the defendant, and who, on appealing, gives another bond to secure the damages recovered against him, to furnish an additional bond for the purpose of securing the amount of the debt.” A writ of prohibition was granted, but the plaintiff was first required to furnish an additional bond for \$75,000 to protect the bank in case it should appear the injunction had been wrongfully taken out.

The cases referred to in twentieth and twenty-second annuals have no direct analogy to the case under consideration.

Entertaining these views, we conclude that the relator can only avail herself of a suspensive appeal in this case by conforming to the requirements of article 575 of the Code of Practice, by furnishing bond with security in a sum exceeding by one-half the amount of the order or judgment rendered against her.

It is therefore ordered, adjudged and decreed that the rule taken in this case be discharged at relator's cost. It is further ordered that a suspensive appeal be granted to the relator in this case; provided that within fifteen days from the rendition of this decree she furnish bond with security, according to law and in conformity with this decree, in favor of the plaintiff, J. F. Pargoud.

HOWELL J., *dissenting*. I think the doctrine in the *Stackhouse* case in 21 An. p. 152, should be adhered to, and I can add nothing to what is said therein in support of the doctrine which I consider applicable to this case, and think the prohibition herein should be made perpetual.

WYLY, J., *dissenting*. The relator enjoined under articles 739 and 740 Code of Practice the order of seizure and sale sued out by J. Frank Pargoud against her to enforce a special mortgage. At the trial the

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court dissolved the injunction without damages, and the relator sought to take a suspensive appeal from the judgment, tendering a bond sufficient for costs and for damages for frivolous appeal. The court, however, refused to allow a suspensive appeal, unless the relator would furnish bond for one-half over and above the amount of the mortgage debt for which the order of seizure and sale issued.

The question is, was the relator bound to furnish the bond required by the judge?

As no appeal was sought from the order of seizure and sale, no bond was necessary to stay the execution thereof—that had already been suspended by the injunction. The question is what bond is necessary to suspend the judgment dissolving the injunction?

That was the precise question presented in the case of State, ex rel. Stackhouse, v. Judge of Fifth District Court (21 An. 152). And there, after examining the authorities, this court held that a bond for one-half over and above the amount of the judgment dissolving the injunction will be sufficient for a suspensive appeal. This is all that is required by article 575 Code of Practice.

The bond tendered by the relator, in my opinion, was ample; and the judge had no right to require a bond for one-half over and above the amount of the order of seizure and sale. But, it is urged, that the injunction was obtained under articles 739 and 740 Code of Practice, without bond, and that if the relator gets a suspensive appeal there will be no security for the amount of the executory process enjoined.

To this the reply is, the injunction issued according to law, there being no question that the relator complied with the requirement of articles 739, 740. If the law permits an injunction of executory process in certain cases without bond, the judge has no right to defeat the law, because, in his opinion, there should be some security for the mortgage creditor pending the litigation of the injunction suit.

If the law-giver had intended additional security to be given to maintain the injunction granted under articles 739, 740, during a protracted litigation arising from an appeal having been taken from the judgment dissolving the injunction, or arising from any other cause, a provision to that effect would have been inserted in the law.

In the absence of any such provision limiting the right conferred by articles 739 and 740 C. P., I am of the opinion that the suspensive appeal sought by the relator must be granted pursuant to article 575 C. P., which only requires bond for one-half over and above the amount of the judgment dissolving the injunction. Such a bond has been tendered by the relator. But the judge *a quo* says: no, the amount of the bond is not to be measured, in this case, by the amount of the judgment in the injunction suit which you seek to appeal from, but the amount of the bond must be measured by the amount of another judgment or order of seizure and sale staid by the injunction.

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Now, I maintain that this ruling violates the express provisions of article 575 and the well settled adjudications of this Court, to the effect that, in determining the amount of a bond for a suspensive appeal, the amount of the judgment sought to be appealed from alone must be considered.

The effect of a suspensive appeal from the judgment dissolving the injunction in this case, would be to leave the writ granted under articles 739 and 740 in full force until the final disposition of the case in this Court. Now, whether such an appeal will subject the mortgage creditor to loss unless a bond be given to secure the debt, or whatever hardship may occur to him on account thereof, is a question not to be considered by the Court. The only proper view of the subject is, the law allows the injunction without bond, and the law allows a suspensive appeal with a bond for one-half over and above the amount of the judgment dissolving the injunction. If the enforcement of the law, in the case under consideration, produces hardship or loss to the mortgage creditor, the court must, nevertheless, enforce the law. We have no right to deny the relator a suspensive appeal, in view of the bond which she tenders conformably to article 575 C. P.

The right to an injunction and the right to an appeal are given by the law upon the conditions therein required. The relator in this case has complied with the law, and, in my judgment, is entitled to a suspensive appeal. I therefore dissent in this case.

No. 4773.

W. J. W. WOODRUFF v. WILLIAM S. LOBDELL.

The exceptions to the proceedings in this case are substantially similar to those set up in the case of *Morgan v. Kennard*, 25 An. p. 238, and which this court held to be untenable. See also *Bonner v. Lynch*, 25 An. p.

APPEAL from the Fifth Judicial District Court, parish of West Baton Rouge. *Cole, J. G. A. Griffith, R. W. Knickerbocker and Stafford, Belden & Foley*, for plaintiff and appellee. *H. M. Favrot, Barrow & Pope*, for defendant and appellant.

LUDELING C. J. This is a suit for the office of Parish Judge of West Baton Rouge, under act No. 39, of the General Assembly of 1873.

The defendant urged several exceptions to the proceedings, which were overruled by the judge *a quo*. They were substantially similar to those set up in the case of *Morgan v. Kennard*, and which this court held to be untenable.

The defendant then filed a lengthy and verbose answer, whereupon the plaintiff moved to strike out portions of the answer which referred to and were based upon an election said to have been holden in No-

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vember, 1872, on the ground that in a suit like this no inquiry could be had concerning the election. Without deciding whether it be the better practice to move to strike out any irrelevant matter in an answer, or to object to evidence on the subject when offered, about which no question was made in this case, it is now well settled that the judge *a quo* ruled correctly in refusing an inquiry in regard to the election. See *Bonner v. Lynch*. He also ruled correctly in refusing a jury trial. *Morgan v. Kennard*. 25 An. 238.

It appears that the plaintiff has been duly commissioned by Governor W. Pitt Kellogg, and that he has qualified according to law. The defendant has offered no commission to the office whatever. The judgment of the District Judge in favor of the plaintiff is manifestly correct.

It is therefore ordered that the judgment be affirmed with costs of appeal.

WYLY, J., *dissenting*. This is a proceeding by rule, under act No. 39, of the statutes of 1873, for the office of parish judge.

I think the suit should be dismissed, because the law under which it is brought is unconstitutional. My reasons for this conclusion were expressed in my dissenting opinions in *Morgan v. Kennard*, 25 An. 238, and *Hughes v. Pitkin*, 25 An. 127.

But laying out of view the unconstitutionality of the act, I still think this demand should be rejected, because the suit is not authorized by the statute under which it was brought. Act No. 39 is not a general law, or a law providing a remedy generally for cases where there is a controversy for office. It is a statute authorizing a summary proceeding by rule in the particular cases mentioned in the act, and none others. It authorizes a proceeding by rule where there is a dispute or controversy for a judicial office only, in the following cases:

First—Where the plaintiff was appointed judge by the Governor, confirmed by the Senate, and commissioned.

Second—Where he has been elected, and commissioned in pursuance of said election.

In these two cases only the statute declares that the "commission shall be *prima facie* proof of the right of such person to hold and exercise such office * * * and such person, so commissioned, shall have the right to proceed by rule before any court of competent jurisdiction to have himself declared to be entitled to such office, and to be inducted therein." Sections 1 and 2, of act No. 39, acts 1873.

Woodruff does not pretend to have been commissioned in pursuance of an election. On the contrary, he alleges that he was appointed and commissioned by the Governor. He was not, however, confirmed by the Senate, the Legislature having adjourned before he was appointed.

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Without legislating, this court can not declare the plaintiff entitled to the benefit of the act under which he sues, because it does not embrace his case. The law requires an appointment, a commission, and a confirmation of the appointment by the Senate. The plaintiff does not pretend that the Senate ever confirmed his appointment. He therefore has no more right to proceed under act No. 39 than any other contestant for office. His remedy is under the intrusion law. I dissent.

No. 3356.

Q. A. THOMAS v. THE CITY OF NEW ORLEANS.

The plaintiff in this case is bound by the modified contract to which he gave his assent, and by his own interpretation of it.

The city is not in default, and consequently not liable in damages.

APPEAL from the Fifth District Court, parish of Orleans. *Cooley, J.* Jury trial. *Hornor & Benedict*, for plaintiff and appellee. *George S. Lacey*, City Attorney, for defendant and appellant.

TALIAFERRO, J. The plaintiff's demand against the city is made up of alleged losses incurred by him in the nature of damages arising, as he avers, from the failure on the part of the defendant to comply, on its part, with a contract entered into with him to furnish a large quantity of shells to be used on the public streets of the city. He avers loss to a large amount in the discount of certain certificates of indebtedness received by him in part payment of portions of the quantity of shells delivered by him, the defendant, as he avers, being bound to make payment in money, which it failed to do. He alleges loss to the amount of \$1120 on seven thousand barrels of shells brought to New Orleans in pursuance of his contract with the city, which it refused to take, compelling the plaintiff thereby to sell them at private sale. He claims, besides, \$4100 for loss sustained from various sums expended in the purchase of suitable boats in which to transport the shells through Harvey's Canal, and for divers other appliances, which he alleges were necessary for him to obtain in order to enable him to comply with his contract to furnish one hundred and fifty thousand barrels of shells. The boats and the various implements necessary for the works, houses built at the shell banks for the accommodation of his laborers, a large supply of ropes, and many other necessary things in the prosecution of so large an engagement, he alleges, became valueless by the default of the city to comply with its contract; and, in addition, he estimates a large loss in profits he would have realized had he gone on to complete his undertaking, which he alleges he was willing and able to perform.

The case was tried before a jury. A verdict was rendered in the

plaintiff's favor for \$14,298 04, with interest at five per cent. from the twelfth June, 1871.

Judgment being entered for that sum, the defendant has appealed.

Proposals were made, in the usual manner, to persons inclined to enter into a contract for furnishing the city with one hundred and fifty thousand barrels of shells, and bids were invited. The plaintiff's bid turned out to be the lowest. By the proposals, it was stated that the city reserved the right to reject any and all bids. On the twenty-sixth of July, 1870, West, Administrator of Improvements, in his report, suggested that Thomas' bid be accepted for fifty thousand barrels of shells, with reservation on the part of the city to accept or reject, within sixty days, the remaining one hundred thousand barrels. The city, through its proper agents, on the twenty-eighth July, accepted the bid in conformity with the Administrator's report. In conformity with this report and acceptance, the contract was entered into on the twenty-ninth of July, by the Mayor and Thomas, by notarial act.

It does not appear that any formal acceptance or rejection of the remaining one hundred thousand barrels was ever made. We are not prepared to infer from this fact that the city was bound to extend the contract beyond the fifty thousand barrels. The fact that the city, having first proposed for one hundred and fifty thousand barrels and accepting a contract for only fifty thousand barrels, the inference, we think, is reasonable that the city, by its silence, intended to reject the contract as to the surplus. At all events, the conclusion seems as strong as would be the opposite one, that the failure to reject implied an intention to accept. If it were merely a matter of doubt, the construction should be in favor of the city.

There is a large amount of oral testimony offered to show the damages alleged to have been sustained by the plaintiff. An impression, it seems, is aimed to be made, both by the tenor of the plaintiff's own testimony and by his counsel's brief, that the plaintiff was compelled by the rigid course alleged to have been pursued against the plaintiff by a powerful corporation, to accept, through his personal necessities, the paper of the city instead of money, as the plaintiff says, the contract calls for. The evidence does not induce us to think there was any failure to comply with the contract on the part of the city. We think it is fairly to be inferred that the plaintiff was informed that cash in hand was not to be expected. The plaintiff on the nineteenth of July, 1870, ten days before the contract was signed before the notary, wrote to the Administrator of Improvements as follows:

"To J. R. West, Administrator of Improvements—Sir: I hereby agree to accept in payment for one hundred and fifty thousand barrels of shells to be delivered to the city of New Orleans, as per acceptance

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of my bid by the Council this day, bonds of the city of New Orleans payable ten years after date with interest at the rate of seven and three-tenths per cent. per annum, at the rate of ninety cents on the dollar. It being understood as part of and essential to this agreement that the city shall provide by ordinance for the issue of such bonds, and shall set apart from the receipts of wharfage and levee dues a sufficient sum annually to pay the interest and extinguish the principal of the same within ten years from the date of their issue.

“Q. A. THOMAS.

“New Orleans, July 19, 1870.”

It is shown by various receipts in the record that the plaintiff from time to time received what were termed “convertible certificates,” in which it was stated that the receipts were redeemable in cash on or before the first February, 1871, or in bonds of the city to be issued as described in the certificate. These bonds draw seven and three-tenths per cent. interest.

The contract by notarial act contains this clause: “Payments to be made in cash, or certificates issued by the City Surveyor, approved by the Administrator of Improvements, on the acceptance and measurement of each ten thousand barrels or more barrels.” The plaintiff received the “convertible certificates” for large amounts and sold them in the market for whatever he could get for them, and his transferees, it would appear, obtained the seven three-tenth per cent. bonds for them.

The damages claimed are for the most part of the speculative kind and not recoverable. We do not find the city was in default, and consequently it is not liable in damages.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff and appellee paying costs in both courts.

ON REHEARING.

LUDELING, C. J. A re-examination of the facts and the law satisfies us that there was no error in the original opinion rendered in this case.

It is true that, under a resolution of the City Council of the tenth of June, 1870, proposals for furnishing one hundred and fifty thousand barrels of shells were invited. This invitation for bids was subject to the condition that the city could reject all bids. As Thomas' bid was the lowest, the Administrator of Improvements advised that a contract be adjudicated to him for fifty thousand barrels, with a right reserved to the city to accept or reject the remaining one hundred thousand barrels within sixty days. The City Council adopted the suggestion.

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The city thus modified the contract. The resolution of the twenty-sixth of July, 1870, adjudicated a contract to Thomas for fifty thousand barrels of shells, and this is the only adjudication or contract between the parties. It is said that the city could not modify the contract without Thomas' consent. The city had the right to reject the bid *in toto*, or she might propose a modification of the contract bid for by the plaintiff, and, of course, such modified contract would only be binding on Thomas if he assented to it. This he did in the notarial act signed by him. And the term *cash* used in the notarial act is explained by the letter of the plaintiff, written ten days before the contract was made, to the Administrator of Improvements—that is, money, or bonds of the city at ninety cents on the dollar. This interpretation of the contract appears to have been put upon the contract by the plaintiff himself, by taking convertible certificates for said bonds in payment for shells delivered under the contract.

We think the city has not been in default. We therefore adhere to the decree hitherto made in this case.

No. 4705.

Mrs. CHARLOTTE M. CONNER v. Mrs. A. L. BRASHER et al.

25	083
49	1383

Express mention must be made in the nuncupative will by public act that the witnesses were present at the time it was received by the notary and dictated by the testator, otherwise the instrument does not conform to the requirements of article 1578 of the Revised Code, and is therefore void.

That the witnesses came with the testator to the office of the notary and were present when the will was read to him, is not sufficient. This might be strictly true, and yet the witnesses might not be present at the dictating and writing of the testament.

A PPEAL from the Second District Court, parish of Orleans. *Tissot, J. Horner & Benedict*, for plaintiff and appellant. *Race, Foster & Merrick*, for defendant and appellee.

WYLY, J. The plaintiff appeals from the judgment rejecting her demand to annul the nuncupative will by public act of John Thomas Osburn, deceased, on the ground that the formalities required by article 1578 of the Revised Code were not observed in making it. The instrument states that personally appeared before the notary, William L. Pool, at his office, "John Thomas Osburn, an old resident of this city, and with him also came the three witnesses hereinafter named and hereto subscribing, which said John T. Osburn declared, although he was in the enjoyment of his ordinary good health, suffering more from blindness than from any other malady, yet he felt admonished by his advancing age of the uncertainty of life, and that while blessed with sound mind, memory and understanding, it was only a measure of becoming consistency that he should adjust the affairs of his estate and effects according to his own discretion and judgment, and he

Mrs. Charlotte M. Conner v. Mrs. A. L. Brasher et al.

therefore requested of me, notary, to receive his last will and testament as he would dictate the same to me, in the following words, to wit." (Here follow the dispositions, which need not be considered.) And the testament closes: "Thus, I, notary, have written the foregoing will without interruption or turning aside to other acts, as the said testator dictated the same to me, and having read the same to him in the presence of the witnesses, in a loud and intelligible voice, he, said testator, declared that he heard and understood the same perfectly well, and persisted therein. Done in the presence of Aaron Johnson French, Louis Choate and Isaac T. Hinton, all witnesses of the lawful age of majority, and domiciliated in this city, who hereto sign their names with said testator and me, notary (the said testator making his mark hereto, being prevented from writing his name ever since his affliction of blindness); all on the day, month and year hereinbefore written."

We find in this will no express mention that the witnesses were present at the time it was received by the notary, and dictated by the testator. That they came with him to the office of the notary, and were present when the will was read to him was not sufficient. This might be strictly true, and yet the witnesses might not be present at the dictating and writing of the testament. The instrument does not conform to the requirements of article 1578 of the Revised Code, and it is therefore void. 21 An. 115; 12 La. 117; 8 An. 469; 11 An. 108; 20 An. 203.

It is therefore ordered that the judgment herein be annulled and reversed, and it is further ordered that the nuncupative will by public act of John Thomas Osburn be annulled and avoided; that the probate thereof be revoked, and all proceedings thereunder be set aside, defendants paying costs of both courts.

No. 4772.

STATE OF LOUISIANA ex rel. FRANCOIS LACROIX v. JUDGE OF THE FIFTH DISTRICT COURT et als.

A suspensive appeal being in force, respondents in this case conceded nothing in releasing the seizure of the relator's property for thirty days on his promise to pay the amount of the judgment rendered against him, with interest and costs. They had no right whatever to execute the judgment pending the suspensive appeal.

Therefore the promise insisted on was a mere *nudum pactum*, which could no more defeat the appeal than a like promise not to take an appeal could defeat one subsequently taken according to law.

WRIT OF PROHIBITION to the Judge of the Fifth District Court, parish of Orleans. *A. B. Philips*, for relator. *M. E. Livaudais*, for respondent.

WYLY, J. On the fifteenth of October, 1872, the judge of the Fifth District Court, parish of Orleans, set aside the suspensive appeal in the case of Mrs. S. Costera et als. v. François Lacroix, on the ground

State ex rel. Lacroix v. Judge of the Fifth District Court et als.

of the insolvency of the surety, and allowed the appellant ten days to file another appeal bond, which was accordingly done.

On the twenty-first of May, 1873, the judge, in a proceeding contradictorily with the parties in interest, again set aside the appeal and ordered execution to issue against the relator on the ground that J. A. E. Bonnet, the surety on the second appeal bond, was not good and sufficient. The relator subsequently applied for and obtained the writ of prohibition, upon which the case is now presented for determination.

The important question is, is the surety, J. A. E. Bonnet, good and sufficient? If he is, the Fifth District Court was without jurisdiction to set aside the appeal and issue execution against the relator.

The amount of the judgment appealed from is \$1145, with legal interest from twenty-first of May, 1872. A bond of \$1800 would be sufficient for a suspensive appeal. The relator, however, gave a bond for \$3500. It is proved that J. A. E. Bonnet is worth \$2000, and that he owes no debts. There is no counteracting evidence. We think the surety is good and sufficient.

The respondents, however, contend that after the appeal was set aside, and execution had issued against the property of the relator, the latter acquiesced in the order of the judge by entering into a verbal agreement with the respondents that he would pay the amount of the judgment, interest and costs if they would release the seizure of his property for thirty days, which was accordingly done; that at the expiration of the thirty days, the relator refusing to pay according to his agreement, execution was again issued against his property, and on the day preceding that fixed for the sale thereof they were notified of the prohibition herein, being more than sixty days after the entry of the order setting aside the appeal.

We see no force in this defense. Assuming that the relator made such an agreement (of which there is no proof except the *ex parte* affidavit of the respondents), we fail to observe any consideration therefor.

The suspensive appeal being in force, as we have just shown, the respondents conceded nothing in releasing the seizure of the relator's property for thirty days. They had no right whatever to execute the judgment pending the suspensive appeal. Therefore the promise insisted upon was a mere *nudum pactum*, which could no more defeat the appeal than a like promise not to take an appeal could defeat one subsequently taken according to law.

It is therefore ordered that the prohibition herein be made perpetual, and that the relator, Mrs. Costera, testamentary executrix, pay costs of this proceeding.

HOWELL, J., *dissenting*. The writ of prohibition is not one of right, but should issue or not just as the circumstances of each case will war-

State ex rel. Lacroix v. Judge of the Fifth District Court et al.

rant. In this case, I do not think the facts justify its issuance. The first bond given by the relator was declared invalid, and he was allowed to furnish another, which was declared insufficient, and execution was ordered. It was issued and property seized. Instead of complaining, or taking any steps to arrest the execution of the judgment, he virtually admitted the correctness of the order setting aside his appeal and the right of the plaintiff in the writ to execute the judgment, by promising to pay the judgment within thirty days, if plaintiff would stay the sale that long. When that delay, thus granted to him, expired, and the judgment not being paid, the property was again advertised, and it was only four or five days before this second day of sale that he applied for a writ of prohibition. In my opinion, he is not entitled to it, under the circumstances, admitting the second bond to be good and sufficient, which I think is doubtful.

MORGAN, J., concurs in this opinion.

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No. 4828.

STATE ex rel. F. C. MAHAN v. JUDGE OF THE FIFTH DISTRICT COURT,
parish of Orleans.

After an execution is enjoined and a suspensive appeal taken from the judgment dissolving the injunction, the court is without power to order the sale of any part of the property under seizure and the proceeds to remain in the hands of the sheriff pending the appeal. The injunction bond is presumed to be ample protection to the plaintiff in execution, and until the injunction is finally determined, all proceedings in the case are suspended, except in regard to the appeal bond.

APPPLICATION for a writ of prohibition directed to the Judge of the Fifth District Court, parish of Orleans. *Tissot*, Judge of the Second District Court, parish of Orleans, presiding in the absence of *E. N. Cullom*, Judge of said Fifth District Court. *John Ray*, for relator.

HOWELL, J. After an execution was enjoined and a suspensive appeal taken from the judgment dissolving the injunction, the plaintiff and appellee moved to sell a part of the property under seizure, the proceeds to remain in the hands of the sheriff pending the appeal, which, on hearing the parties, was ordered. The defendant and appellant now asks a prohibition restraining the said sale on the ground that the court *a qua* is without jurisdiction to render such order. The judge answers that under the equitable power of the court to preserve the property under seizure, he ordered the sale, because the expense of keeping exceeded the value of the property.

The court was without power to render the order complained of after a suspensive appeal was taken. The injunction bond is presumed to be ample protection to the plaintiff in execution, and until the injunction is finally determined all proceedings in the case are suspended, except in regard to the appeal bond. Let the writ herein be made perpetual.

State ex rel. Magloire v. Barbin, Sheriff; and Magloire v. Barbin.

No. 4778.

STATE, ex rel. PIERRE MAGLOIRE, v. A. L. BARBIN, Sheriff; and
PIERRE MAGLOIRE v. A. L. BARBIN.

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128 841

The delays for filing an appeal only run when this Court is sitting.

It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. If he neglect so to do, the Court is without means of reviewing the case, and the appeal will be dismissed.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Hewes, J. Olivier Provosty*, District Attorney, for relator and appellee. *Ducote*, for the same. *Irion & Thorpe*, for defendant and appellant.

MORGAN, J. This is a contest for office. There was judgment in favor of plaintiff, and the defendant appealed.

Appellee moves to dismiss the appeal upon several grounds:

First—The transcript or record was not filed within the time required by law, ten days. Section 13 of the act of 1866, page 154, provides that, "In all cases in which the right to office is involved, and an appeal is taken from the judgment of the district court, returnable before the Supreme Court holding its sessions in New Orleans, it shall be returnable in ten days after the judgment of the lower court; and the Supreme Court, on motion of either party, shall proceed to try the same by preference."

The judgment appealed from was signed on the eleventh of August, 1873. An appeal was allowed returnable to this court in ten days. The transcript was not filed until the third of September.

The transcript was filed in time. This Court was not in session when the appeal was made returnable. The delays only run when we are sitting. The authority relied on in 21 Annual, page 174, does not apply, the delays having expired while the Court was open.

Second—Because the transcript filed by appellant is not complete: it not containing all the evidence offered on the trial of the cause below.

In his answer, the defendant avers that he was duly elected sheriff of the parish of Avoyelles, and a commission issued to him as such, without reciting by whom the commission issued. On the trial, the defendant offered the commission in evidence. We can not find it in the record.

In *Harris v. Hays*, 8 An. 433, it was held that, "It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. If he neglect so to do, the Court is without means of reviewing the case, and the appeal will be dismissed."

In *Hall v. Beggs*, 17 An. 130, it was held that, "Where documents offered in evidence below are not to be found in the record, the appeal will be dismissed." The same rule has been observed in 11 An. 72; 16 An. 40; 18 An. 232.

In accordance with these authorities, the appeal is dismissed.

No. 4029.

HOWARD, PRESTON & BARNETT v. WILLIAM H. SIMMONS et al.

Where the irregularities in the proceedings in the court *a qua*, which are complained of, are more technical than real, and where, on the whole, substantial justice has been done, the judgment will not be disturbed.

While it is a general rule that petitions in injunction suits are not allowed to be amended, still when events have occurred since the institution of the suit, which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition.

Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another.

A PPEAL from the Fifth District Court, parish of Orleans. *Leaumont, J. Wooldridge & Thomas* for plaintiffs and appellees. *Race, Foster & Merrick* for defendants and appellants.

LUDELING, C. J. On the twenty-fifth of August, 1868, the defendants obtained a judgment against the plaintiffs in the State of Mississippi, from which no suspensive appeal was taken. Thereupon suit was instituted in the Fifth District Court of the parish of Orleans on the seventeenth of December of the same year, in which, on the production of an exemplified copy of the proceedings had in Mississippi, that judgment was made executory in this State. The decree of the Fifth District Court was that "the final judgment, rendered in the Circuit Court in and for Rankin county, in the State of Mississippi, in favor of each of the plaintiffs herein, with interest and costs, and against the defendants, in solido, be ratified, confirmed and made executory by this court, the same as in the said Circuit Court." On appeal, this court affirmed the judgment.

While these proceedings were being had in this State, Howard, Preston & Barnett were litigating in the courts of Mississippi in regard to said judgment. They took an appeal from the Mississippi judgment without *supersedeas* to the Court of Errors and Appeals of that State. At the November term of that tribunal for the year 1871, a decree was rendered in favor of appellants, reversing the judgment of the Circuit Court of Rankin county, on which proceedings had been instituted in this State, as aforesaid.

After the judgment of this court had been rendered an execution was issued and placed in the hands of the sheriff, who went to the office of Howard, Preston & Barnett to make a seizure. About two hours afterwards, Howard, Preston & Barnett sued out an injunction which was served on the sheriff at about half-past twelve o'clock. The deputy sheriff who had the execution, remained in the office of Howard, Preston & Barnett until a little before three, when he stated to them that unless the execution was satisfied, he would seize the contents of their safe. To avoid this, they paid the amount of the execution—they say under protest, while Simmons et al. say they paid voluntarily.

Howard, Preston & Barnett v. Simmons et als.

We think the statement of facts above made shows the payment was not voluntarily made. The irregularities in the proceedings in the district court, complained of, are more technical than real. On the whole, we think substantial justice has been done. The defendants in this suit attempted to execute a judgment, which had not become *res judicata*, and the judgment was reversed on appeal before the money had been paid to them. We think that justice and law would require the money to be returned by the sheriff to the plaintiffs in this suit.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

WYLY, J.—*dissenting*. The judgment which the plaintiffs injoin the defendants from executing is a judgment which stands unrevoked, no attempt having been made to revise it in the manner provided in the Code of Practice.

The plaintiffs, however, injoin its execution, because the judgment in Mississippi, upon which it is based, has been revised and reversed in that State.

I can not concede that a judgment rendered in this State (it matters not upon what evidence it is based) can be annulled by a proceeding in Mississippi to revise the judgment there. Nor can I sanction the practice of barring perpetually the execution of a final judgment in this State which has not been revoked nor sought to be revised in the manner provided by the Code of Practice.

That the judgment has been reversed in Mississippi might be a good defense to the suit here upon that judgment, but after judgment in this State no proceeding in Mississippi can destroy it. The court here which pronounced the judgment, alone has jurisdiction to reverse it in a proceeding to revise it according to the Code of Practice. It is well settled that a judgment merges into itself the claim or instrument upon which the demand is based.

Therefore the claim or judgment from Mississippi became merged into the judgment in this State; and until it is annulled in a proceeding here it is a valid judgment, and can be enforced, notwithstanding the judgment in Mississippi has been pronounced invalid.

A judgment is property, and it can not be annulled or reversed except in a proceeding authorized by law. In this suit the plaintiffs have not demanded the nullity of the judgment. Perhaps the action is barred by prescription. The legal right of the defendants in virtue of their judgment, in my opinion, can not be destroyed by any judgment or decree whatever of the courts of Mississippi, and perpetually barring the execution of the judgment here is practically its destruction.

I therefore deem it my duty to dissent in this case.

Howard, Preston & Barnett v. Simmons et al.

ON REHEARING.

LUDELING, C. J. After a careful re-examination of the record in this case, we are convinced that the facts of the case were correctly stated, and that the conclusions arrived at were legal and just.

The technical objections, principally urged by defendants, were: that there was no legal injunction bond in the case, because the bond is not signed by all the parties applying for the injunction, and because the bond is made payable to the clerk of the court; and that the supplemental petition ought not to have been filed.

The suit is brought in the name of a commercial firm; the bond is signed "Howard, Preston and Barnett," and Howard & Preston and E. Woolridge as securities; and it is made payable to "Louis Powers, clerk, and William H. Simmons et als., heirs and executors," etc.

While the injunction suit was pending, the plaintiffs alleging that, since the institution of the injunction suit, the Court of Errors and Appeals of Mississippi had reversed and annulled the judgment which had formed the basis of the judgment enjoined in this State, and they urged that as an additional reason for sustaining their original injunction. The objections to this supplemental petition were: that it came too late, the case having been submitted for decision to the court; and that in an injunction suit, the petition can not be amended.

It is clear that, if the judge *a quo* had decided the case on hearing the facts stated in the supplemental petition, he could have granted a new trial. And while it is a general rule that petitions in injunction suits are not allowed to be amended, still when events have occurred since the institution of the suit which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition. Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another. C. P. 748.

We therefore adhere to our original opinion.

*THE STATE v. ZACK MCFARLAND.

WYLY, J., *dissenting*. In January, 1873, the defendant, Zack McFarland, was indicted for murder. He was arrested by the sheriff of the parish of Caddo, and on the fifteenth day of March he applied to the District Judge of said parish for a writ of habeas corpus, alleging in his petition that he had been indicted for murder; had been arrested by the sheriff, and was lodged in jail. He also averred that he was not guilty of the crime charged, but at the time he shot the said Aleck (James Alexander) the said Aleck was then and there in the act of killing and murdering his (petitioner's) brother, and that petitioner shot and killed the said Aleck to prevent the killing of his brother aforesaid. He further alleged that he had no preliminary examination and no opportunity to vindicate his innocence, and that his imprisonment was illegal and unjust. The court granted the writ, tried the case, and on nineteenth March, 1873, finding that the accused was entitled to bail, "ordered that he be released from custody upon giving bond with good security in the sum of three thousand dollars, conditioned according to law, and the sheriff or any deputy be authorized to take and approve said bond."

On the same day, to wit: Nineteenth March, 1873, the accused gave the required bond in favor of the Governor of the State of Louisiana for \$3000, with A. H. Leonard, John W. Lawton and John Lake as sureties. This bond was approved by the District Judge.

On the third day of June, 1873, the bond was duly forfeited and judgment was rendered against the principal and his securities *in solido* for the amount thereof, \$3000. The sureties then moved to set aside the judgment on the following grounds:

First—There was no indictment against McFarland that he was legally bound to answer, because it was not found by a legal grand jury; consequently there was no warrant for his arrest, and his detention and imprisonment were illegal.

Second—If the indictment be valid, McFarland was not legally bound to appear before the court at this term, because the law prohibits him from recognizing usurpers in office, and because the offices of clerk of said court and sheriff of said parish are now usurped by S. W. Morrison and J. W. Pickens, pretending to act without authority of an election declared by a returning board constituted by law, and without authority of a commission from the Governor of the State.

Third—That the bond was not taken by any one legally authorized to take the same, and it is, therefore, null and void; that the court was without authority to order Pickens or any one acting as deputy for

* The omission by the clerk of the court at Monroe to send this dissenting opinion with the record of the case, implied that there was none, and prevented its being published in the proper place. See page 547.

him to take the bond of said McFarland, and they were without authority and prohibited by law from so doing, or performing any other act as sheriff.

They also allege that no judgment can be taken on the bond or any other action be taken at this term of the District Court, because the clerk and sheriff are without authority to act as aforesaid. Considerable testimony was adduced for and against the rule or motion; the court, however, overruled it, and Leonard, Lawton and Lake, the sureties on the bond have appealed. Morrison and Pickens, the clerk and sheriff, were both commissioned by H. C. Warmoth, Governor, on the fourth day of December, 1872, and it is "admitted that these officers have taken the necessary oaths of office and filed their bonds in accordance with law." It is also "admitted that J. W. Pickens obtained peaceable possession of the office of sheriff of Caddo parish on the twenty-third of December, 1872, and on that day entered peaceably on the duties of said office, and has been continuously in possession thereof ever since, discharging the duties of said office."

It is proved that S. W. Morrison has been the acting clerk of the Tenth District Court since twenty-third of December, 1872, and has continued in the open, undisturbed and continuous discharge of the duties of said office ever since. Also that his immediate predecessor, Samuel C. Wright, voluntarily delivered to him possession of the clerk's office, the books, records, etc.

The question is, are the official acts of the officers valid? Are they binding as to third persons, or are they absolute nullities? Did the commissions, the oaths, the bonds, and the open, peaceable and undisturbed possession of these offices since twenty-third of December, 1872, give the sheriff and clerk of the parish of Caddo a color of title to their offices, the standing of *de facto* officers rendering their official acts valid? Under the settled jurisprudence of this State these questions must be answered in the affirmative. This is the jurisprudence of other States of the Union, and also of England. *Buckham v. Ruggles*, 15 Mass. 183; *Mason v. Dillingham*, 15 Mass. 171; *McInstry v. Tanner*, 9 Johnson 135; 3 *Abbot's Digest* 352, sections 63, 64, 65, 66, 67, 68; *United States Dig. (new series)* vol. 2, 1871, page 519, section 23; 3 *An.* 633; 10 *An.* 524; 13 *An.* 607; 22 *An.* 33; 16 *Peters* 71; 13 *An.* 404.

In the *Citizens' Bank v. Bry et al.*, 3. *An.* 631, it was held that "the acts of an officer *de facto* in the exercise of the ordinary functions of his office are valid in respect to the rights of third persons who may be interested in such acts."

In the *State v. Gilbert*, 10 *An.* 524, a case directly in point, where the sureties of Gilbert opposed the forfeiture of his bond on the ground that "William H. Dinkgrave, who acted in taking said bond as sheriff, was not sheriff at the time he took said bond, never having taken the

oath nor given bond as required by law, and being ineligible under the constitution to act as sheriff," this court held that: "There is no weight in the position that Dinkgrave was not sheriff *de jure*. Conceding that he was not, it is shown that he was the sheriff, and the only sheriff *de facto*, under color of title, and his official acts as such are not absolute nullities, but must be held good in controversies between third persons."

In *Cash v. Whitworth*, 13 An. 404, it was held that: "The objection urged by the plaintiffs to the mode of choosing the Third Swamp Land Commissioner can not avail them. He is an officer of the State *de facto*, acting under color of legal authority, and he is not a party to this suit. To declare his acts null and void by a side-long judgment in a suit between third persons, would be contrary to reason as well as to precedent."

In *Miahle v. Fornet*, 13 An. 607, it was held that: "When a warrant is drawn by those who are *de facto* directors of a public school of a particular district, the treasurer can not set up as a defense that the directors were not elected and had not qualified as directors."

In the *State v. Lewis*, 22 An. 33, the objection was raised that N. J. Scott, before whom the case was tried, was not Parish Judge; in disposing of this objection this court used the following language:

"It appears that N. J. Scott performs the duties of the office of Parish Judge of the parish of Claiborne. His capacity and right to perform these duties can not be inquired into collaterally."

This has frequently been decided by this court, and in all the cases heretofore presented a different ruling has been made. Here the sureties on the bond of the defendant seek to escape liability on the ground that Morrison and Pickens were not clerk and sheriff. They attack the title of these officers collaterally, and in a proceeding in which they are not parties, contrary to the well settled jurisprudence of this State. To decide in this collateral manner that Morrison and Pickens are not clerk and sheriff would be to determine their rights without giving them a hearing or any opportunity of making a defense. No one should be condemned without a hearing, nor deprived of a legal right without due process of law. Besides, the right to an office can not be inquired into in this State, except in a proceeding under the intrusion act or in a suit to contest an election. The question can not be raised by a mandamus or in any other way, as has frequently been decided by this court. *State ex rel. Sternberg v. Lagarde*, 21 An. 18; *State ex rel. Hero v. A. Pitot*, 21 An. 336, and other subsequent decisions.

In *State ex rel. Viene v. Hyams*, 12 An. 719, where the relator, who was commissioned sheriff of the parish of Natchitoches, sued out a mandamus to compel Hyams, who detained the keys of the Parish

Prison, to deliver them to him, and where the respondent denied, in his answer, that the relator was legally elected sheriff, and claimed the right to hold over under his former commission until a successor could be legally elected, this court held: "That the act of 1846 prescribes the mode of proceeding in contesting the election of a sheriff. The Supreme Court is not the tribunal to entertain such a contest, and can not go behind the commission to examine the proof upon which the Governor acted in issuing it."

This was also decided in *State ex rel. Bienvenu v. Wrotnowski*, 17 An. 156, and in several later decisions. Now, if the court could not go behind the commission to examine the proof upon which the Governor acted in issuing it, in the case against Hyams, 12 An. 719, where the parties in interest were before the court, how can the court look behind the commissions of Governor Warmoth issued to Morrison and Pickens on fourth December, 1872, in this proceeding where the question is only presented collaterally, and where the parties whose title to the offices in question are not before the court?

If Morrison and Pickens, who went peaceably into possession of their offices under commissions from the Governor, and who are admitted to have qualified and given bond according to law, are not, at least, acting *de facto* officers, under color of title, there never has been a *de facto* officer in this State.

In my opinion the decree which declares all their official acts absolute nullities, flatly overrules the well settled jurisprudence of this State, practically defeats or destroys the titles of Morrison and Pickens to the offices of clerk and sheriff of the parish of Caddo, without giving them a hearing and an opportunity of making a defense.

It is the first time in the jurisprudence of this State that a title to an office has been successfully attacked collaterally, and it is the first time that a commissioned, qualified and bonded officer of this State has been held to be without title and a usurper, in a proceeding to which he was not a party.

But it is urged that the court is compelled to disregard the well settled jurisprudence of this State, to which I have alluded, because of the passage of act No. 41, approved fifth March, 1873. The title of this act is: "An act declaring it a crime to usurp a public office, and providing the punishment for such offense; providing that if any public officer shall adhere to or recognize any usurper, his office shall be forfeited and considered abandoned, and directing and regulating legal proceedings to have such abandonment and forfeiture declared; authorizing the Governor to declare such abandonment and forfeiture in certain cases, and to remove such officers and to fill the vacancy so made by appointment." Section one provides: "That if any person shall assume or pretend to be an officer of the State, executive, judicial or

legislative, without authority of an election declared by the returning board constituted by law, or without authority of a commission from the Governor of the State, in case the laws require such officer to be commissioned, such person so illegally assuming or pretending to be a public officer, shall be deemed a usurper. If any such usurper shall attempt to exercise the functions of a public officer, and shall interfere with any public officer in the discharge of his duties, such usurper so interfering shall be deemed guilty of a crime, and upon conviction may be fined and imprisoned at the discretion of the court, or both."

I find nothing in this section (and it is the only one bearing on the case) that in any manner alters our rules of practice, and compels this court to disregard that principle of universal jurisprudence which is, that no one should be deprived of a legal right in a proceeding to which he was not a party. Morrison and Pickens were not before the court, and in the statute before us there is no warrant whatever authorizing this court to decide they are usurpers, and all their official acts are absolute nullities. This court has only a limited appellate jurisdiction. It can not determine issues upon which the parties whose interest are affected, were not cited to trial in the court below.

The statute before us does not declare that Morrison and Pickens are usurpers. If it did, it would be unconstitutional, because it is a judicial question whether they are or not usurpers, and the authority to decide it belongs alone to the courts. This statute does not attempt to modify or in any manner alter the rules of practice by which civil and criminal cases are brought before the court; it simply makes it a criminal offense for any person not returned as elected by the lawful returning board, or not holding a commission from the Governor, to assume to be an officer and to interfere with any public officer in the discharge of his duties.

Now if Morrison and Pickens have done anything in contravention of this criminal law, inquiry concerning it can only be had by an indictment or information, according to the constitution of the State. And in order to convict them of the crime of usurpation, the facts presented to the court must bring them strictly within the provisions of the statute. Suppose the question was regularly presented by an indictment, and Morrison and Pickens were on trial for the crime of usurpation under the statute, would it not devolve on the State to show that these defendants not only usurped their offices, but also had interfered with some public officer in the discharge of his duties; also, that they assumed to be public officers without having been returned as elected by the lawful returning board, "or without authority of a commission from the Governor of the State?"

Morrison and Pickens do not fall within the provisions of this criminal statute, because they did not assume to be public officers without

the authority of a commission issued by the Governor of the State. They obtained peaceable possession of their offices, under the authority of commissions issued to them by H. C. Warmoth, Governor of the State, on the fourth day of December, 1872, and it is admitted that they took the required oath of office, and gave bond according to law.

Morrison and Pickens went into office on December 23, 1872, under the authority of commissions issued by the Governor, under the great seal of the State. They were in office, and were recognized by the district judge, long before the statute in question was passed, which was on the fifth day of March, 1873.

If the Legislature had desired to embrace these acting commissioned officers within the provisions of this criminal statute, they would have said so. They would have said, that if any person shall assume to be a public officer, and interfere with any lawful officer in the discharge of his duties, without having been declared elected by the lawful returning board, or without a commission issued by the Governor (not including the commissions issued by H. C. Warmoth, Governor, on the fourth day of December, 1872), such person shall be deemed a usurper, and punished, etc. Will this court extend the provisions of a criminal statute, and hold that officers acting under the authority of commissions issued by the Governor, are criminals, and are punishable under a law which only provides a penalty against persons assuming to be officers without commissions issued by the Governor, or without having been returned as elected by the legal returning board?

Suppose the Legislature had extended its provisions so as to cover the case of Morrison and Pickens, and declared it a crime for these commissioned, sworn, bonded, and recognized officers to continue to discharge the duties of their offices, would that part of the statute be valid and obligatory? Are acquired legal rights thus to be destroyed in the face of article 110 of the constitution, prohibiting the Legislature from passing retroactive laws? Is it competent for the Legislature to decide that Morrison and Pickens have no legal title to their offices in the face of that provision of the constitution conferring all the judicial powers of the State upon the courts? I think not. In the case of *Downe v. Towne*, 21 An., this court held that no man can be legislated out of office, and that a constitutional officer can only be removed by address or impeachment.

Morrison and Pickens hold constitutional offices; they held them before the criminal statute in question was passed. The validity of their titles is not a subject for legislative inquiry; it is a matter alone for the courts to determine. But it is urged that the Legislature has only made it a crime for these officers to continue to fill their office; this is virtually deciding that they have no titles to their offices, because the making it a crime for one to hold his property or his office

under titles acquired before the passage of the law, is the strongest decision that he has no titles. The Legislature could not make this decision, and they can not destroy acquired rights by the passage of a retroactive law. Constitution, article 110.

But the strongest objection I have to the ruling of the majority of the court in this case is, that by its decision the court virtually adds to or supplements this criminal statute, by adding, as a further penalty, that all the acts of these officers are absolute nullities. The law has not prescribed this penalty. This court has no authority to supply it. While the Legislature would have no authority, on the one hand, to exercise judicial power, deciding that officers holding under Governor Warmoth's commission of fourth of December, 1872, are usurpers, this court has no authority; on the other hand, to exercise legislative power, and to amend the criminal statute, No. 41, by providing as a further penalty for the crime of usurpation that all the official acts of such officers shall be absolute nullities. It is well for each department of the State to keep within its prescribed powers. And it is dangerous for one department to encroach upon the functions of the other. In prescribing the penalty for the crime of usurpation, if the Legislature had intended to inflict the further penalty that all their official acts shall be absolute nullities, they would have said so in the statute. It was their duty to have informed the people of it, in order that they might avoid, if possible, transacting business before the clerk and sheriff of the parish of Caddo.

In the parish of Caddo is the city of Shreveport, the second largest city of the State. The people of that parish, of this State, of other States, and of foreign countries, have, since the twenty-third of December, 1872, no doubt had much important business to transact in the clerk's and sheriff's offices, and also before the Parish and District Court, and no doubt several terms of the Parish Court. Citations have been served upon which it is perhaps relied to interrupt prescription in suits perhaps involving the entire fortunes of minors, married women and citizens of this State, of other States, and of foreign countries. Judgments have been enforced, sales have been made, criminals have been punished, and all manner of judicial business has been transacted. All this will be annulled, and the rights, perhaps, of thousands of innocent persons will be lost, as the result of the decision of this case. All these disastrous consequences must fall upon the people of Caddo and of other parts of the State, and also the people of other States, in order to punish the crime of usurpation under the statute of March 5, 1873, although that law will be searched in vain to find such a penalty.

In my opinion the case of Morrison and Pickens does not fall within the provisions of the statute No. 41, because it does not declare that a

person holding office under Governor Warmoth's commission of fourth of December, 1872, shall be deemed a usurper and punished as provided in the act. If the statute had denounced its penalty against officers holding such commissions, perhaps Morrison and Pickens would have abandoned these offices. It would be monstrous to convict Morrison and Pickens of the crime of usurpation under statute No. 41, because they have no commissions, when they actually hold commissions from the Governor. A law making it a crime to hold office without a commission ought not to be enforced against those who hold commissions from the Governor. I venture the assertion that there is no court in this State or in the civilized world that would convict Morrison or Pickens, in a criminal proceeding, of the crime of usurpation under statute No. 41.

If they be not usurpers in the meaning of that act (as I believe), no part of the penalty thereof should be applied by this court, assuming that the absolute nullity of all their official acts is a part of the penalty. Criminal law is always construed strictly; in a criminal statute there is no offense except that specially described as an offense, and there is no penalty except that expressly declared to be the penalty. The statute in question has not declared it to be a crime to hold an office under a commission from the Governor; it has not prescribed, as a penalty, that the official acts of such officer shall be absolute nullities. This court can not declare the crime and prescribe the penalty. It can only enforce criminal law in proceedings by indictment or information. Until the criminal act is legally ascertained, the court can not inflict any part of the penalty attached to said act or crime. If the nullity of the official acts of Morrison and Pickens be the result or the legal consequence of their having committed the crime announced in statute No. 41, that crime must be judicially established before the result or consequence or additional penalty can be inflicted.

It would be unreasonable and absurd to presume that Morrison and Pickens, in advance of a trial, are guilty of the crime announced in statute 41, and therefore a part of the penalty, or the legal sequence of the penalty, must now be inflicted. But what has the statute in question to do with this case, a civil proceeding to enforce a bond subscribed by the appellants? This statute only defines a crime and prescribes the penalty. It makes no change whatever of the forms of criminal or civil proceedings, the rules of practice, or the jurisprudence of this State. It authorizes no one to be condemned unheard. It does not presume that any one is guilty. It does not require the court to enforce any part of the penalty before the crime is judicially established. Here the appellants resist the payment of the obligation which they contracted when they signed the bond of Zack McFarland; and they place their sole defense on the ground that the commissioned,

The State v. McFarland.

sworn, bonded and recognized clerk and sheriff of the court were not holding under color of authority, were not *de facto* officers, therefore the bond and all other official acts of the court and of these officers are absolute nullities.

I think I have shown that this defense can not avail them, under the well settled jurisprudence of this State, and under the principles of universal jurisprudence. I think I have shown that the criminal statute No. 41 in no manner changes, or proposes to change, the jurisprudence of this State on the point in question; that it merely defines a crime, affixes the penalty, and leaves the rules of civil and criminal practice and the jurisprudence of this State untouched, and in no manner modified.

I have given this subject mature consideration, and my conviction is, that the judgment of this court is erroneous. I therefore dissent in this case.

LIST OF CASES NOT REPORTED.

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1873.
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NEW ORLEANS.

- No. 2868.—Matilda Flower, wife of W. H. Rice v. C. Tate and C. L. C. Dupuy.
- No. 2545.—E. Thompson v. Rosetta E. Storrs, wife of J. A. Grow.
- No. 2758.—Same.
- No. 3814.—New Orleans, Canal and Banking Company v. W. Bailey et al.
- No. 2748.—Paul Bonseigneur v. F. Lacroix and A. Déjean.
- No. 4463.—J. Livingston v. Carondelet Canal and Navigation Company.
- No. 4486.—State, ex rel. A. and L. Cheval, v. Judge of Fifth District Court, parish of Orleans.
- No. 2514.—Eugene Georgest v. Charles Schonfeld.
- No. 2871.—J. P. Forgay v. A. Desmares—Block & Firnberg, Interveners.
- No. 2922.—A. Marchand v. D. W. Coeler et al.
- No. 4505.—Blanchin & Giraud v. Amos Simms, Sheriff.
- No. 4497.—Brooks & Tennent, agents, v. Blanchin & Giraud.
- No. 2883.—Thomas J. Emerson v. G. F. Porter.
- No. 2818.—Bank of New Orleans v. Orleans Railroad Company.
- No. 2739.—A. I. Frick v. Widow H. C. Stewart.
- No. 4024.—Rice H. Winter and W. A. Steele v. Beadles, Wingo & Co.
- No. 4575.—Elizabeth E. Savory v. Belfort Marionneaux, Her Husband.
- No. 4543.—J. M. Sollibellas v. H. M. Labat—W. L. Morgan, Third Opponent.
- No. 4396.—State, ex. rel. R. K. Diossy, v. James Graham, Auditor.
- No. 2672.—C. Strehle v. Florance Pfister.
- No. 4491.—Louis Langman v. Elizabeth Frenzel.
- No. 4564.—G. L. McDonald v. Sheriff of East Feliciana et al.
- No. 4546.—Harriet Herbert v. Sheriff of East Feliciana et al.
- No. 4563.—W. B. Hobgood v. Evans White.
- No. 3793.—John W. Johnston v. Frederic Calloway.
- No. 4551.—B. Folkes v. J. W. Mason.
- No. 4544.—H. H. Christmas v. Frances E. Tibbets and Husband.
- No. 4498.—Brooks & Tennent v. Blanchin & Giraud.
- No. 4590.—P. Jones Yorke v. President Police Jury, parish of Carroll.
- No. 4548.—Michel Lion v. S. F. Wallishe; City of Baltimore intervening.

- No. 2872.—J. H. Guerchoux v. S. Cambon and T. L. Maxwell, Sheriff.
- No. 2841.—J. Brette v. J. Strauss.
- No. 4106.—State v. H. C. Dibble, Judge of the Eighth District Court, parish of Orleans.
- No. 2812.—Ann Smith, widow of A. W. Horlor, v. Louisiana Mutual Insurance Company of New Orleans.
- No. 4577.—Mrs. Charles A. Slack v. R. O. Hebert, Tax Collector.
- No. 4576.—Mrs. Emily Woolfolk and al. v. R. O. Hebert, Tax Collector.
- No. 4575.—Andrew H. Gay v. R. O. Hebert, Tax Collector.
- No. 4574.—Mrs. Carmelite Picou, widow of Isaac Erwin, v. the same.
- No. 4549.—Kennett, Bell and al. v. James and William Friendship.
- No. 4478.—New Orleans, Mobile and Chattanooga Railroad Company v. T. J. Dugan.
- No. 4484.—State, ex rel. R. C. Drew, District Attorney, v. Judge of the Eighteenth Judicial District Court.
- No. 4508.—State, ex rel. Jennie B. Holbrook, v. Judge of the Superior District Court, parish of Orleans.
- No. 4539.—Mary Stout and al. v. C. Carpenter, Executor and al.
- No. 4528.—Allen F. Webb v. Dora Lambeth and Husband and al.
- No. 4547.—James E. Lee v. T. F. Dixon and al.
- No. 4538.—Frank P. Stubbs and al. v. E. B. Towne and al.
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- No. 4650.—State, ex rel. Lalaurie & Co., v. Judge of the Fifth District Court, parish of Orleans.
- No. 4628.—State, ex rel. S. D. Dixon, Tutor, v. Judge of the Fifth District Court, parish of Orleans.
- No. 4630.—State, ex rel. Jean Marais, v. Judge of the Fifteenth Judicial District Court, parish of Assumption.
- No. 4534.—Henry S. Leverich v. E. M. Wells and al.
- No. 4442.—State, ex rel. W. M. Robinson, v. P. B. S. Pinchback, President Police Board and al.
- No. 3972.—Jules A. Florat v. H. N. McCrea.
- No. 4591.—Frances V. Hollingsworth v. E. G. Bridge.
- No. 4474.—Alfio Leblanc v. D. A. Thibaut and B. Daunoy.
- No. 4015.—William Durbridge v. George Alban et al.
- No. 4606.—Mrs. Charles Watrigant v. Pierre Dufort.
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- No. 4599.—Mateo Azcona v. Manuel Vega.
- No. 2875.—S. H. Kennedy & Co. v. Joseph Raymond.
- No. 2840.—Crescent City Bank v. H. Kendall Carter.
- No. 2876.—John Dolhonde v. J. J. B. Kirk.
- No. 2911.—J. G. Becker v. James Ryback.

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- No. 4671.**—State, ex rel. L. Weil et al., v. Judge of the Fifteenth Judicial District Court.
- No. 4653.**—State, ex rel. W. Zadik, v. Judge of the Second District Court, parish of Orleans.
- No. 2727.**—Weiller & Ellis v. J. W. Blanks & Co.
- No. 2857.**—J. T. Aycock et al. v. McQuoid.
- No. 4567.**—Louisa Vauter v. William Markham et al.
- No. 4593.**—Amelia Richard and Husband v. Pierre Brunet.
- No. 4693.**—State, ex rel. P. Leonard, Administrator, v. Parish Judge of the Parish of Plaquemines.
- No. 4652.**—State, ex rel. H. Mossy, v. Judge of the Superior District Court parish of Orleans.
- No. 2808.**—Frederick Belden v. Read & Hunt.
- No. 2895.**—Harper, Bertram & Co. v. Chenoweth, Casey & Co.
- No. 4503.**—Succession of Octave Vives.
- No. 2958.**—George H. Packwood v. George P. Bucknall.
- No. 2959.**—George P. Bucknall v. W. H. Henning & Co.
- No. 2952.**—Mrs. B. Brandeker, Tutrix & Co., v. J. H. Crippen.
- No. 2951.**—Jacob Weidner v. Canal Bank.
- No. 2879.**—David C. Labatt v. Julius Goldstein.
- No. 2674.**—Jesse A. Bynum v. H. Kendall, Carter & Co.
- No. 2828.**—J. D. O'Leary v. Martin, Cobb & Co.
- No. 4604.**—M. A. Thomas, Wife of Don Carlos Case, v. Dean Adams & Gaff and Sheriff.
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- No. 4537.**—State v. Jeremiah Brown and Edward Morris.
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- No. 4506.**—Succession of Octave Vives.
- No. 4697.**—State, ex rel. Mahan, v. Judge of the Superior District Court, parish of Orleans.
- No. 2938.**—Steamboat Nick Longworth and Owners v. J. N. Shawhan.
- No. 2915.**—Martin Dee, J. O'Niel, Executor, v. Star Mutual Insurance Company.
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- No. 2936.**—Joseph H. Harvey v. B. Margot et al.
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- No. 3934.**—John R. Weatherly v. Azema Shepherd et al.
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- No. 4339.**—Louis Cavalier v. Police Jury parish of Jefferson, right bank.
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- No. 2970.**—C. J. O'Donnell v. J. Grace and William Durbridge.
- No. 3979.**—Camille Bares v. City of New Orleans.
- No. 3980.**—Demerett & Dibrell v. the same.

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- No. 3991.—Everett Lane v. the same.
- No. 3988.—Thomas H. Handy v. the same.
- No. 3989.—Christian Jacob v. the same.
- No. 3986.—L. H. Gardner & Co. v. the same.
- No. 3987.—Forsheimer & Haber v. the same.
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- No. 3985.—L. H. Gardner & Co. v. the same.
- No. 3981.—G. P. Denegre v. the same.
- No. 3983.—Henry Gutman v. the same.
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- No. 3996.—R. S. Morse v. the same.
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- No. 4011.—Schneider & Zuberbier v. the same.
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- No. 4009.—Schneider & Zuberbier v. the same.
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- No. 4007.—G. & T. Searing v. the same.
- No. 4005.—C. Ramelli v. the same.
- No. 4004.—Peet, Williamson & Bowling v. the same.
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- No. 4003.—Peet, Williamson & Bowling v. the same.
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- No. 4433.—State, ex rel. James Dorsey, v. Board of Metropolitan Police et al.
- No. 2942.—Christian Schopp v. Charles Kummel.
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- No. 777.—Orsamus Hays, Administrator, v. T. C. Anderson et al.
 No. 784.—Alexander Latiolais v. Louis V. Mouton.
 No. 782.—Elizabeth Boudreau, wife, et al. v. Raphael Boudreau et al.
 No. 691.—Roman Verdun v. W. M. Smith, Administrator, et al.
 No. 776.—Vincent Boagni v. Arthemise Nezat, Administratrix.
 No. 789.—Marcus Walker v. W. D. Chambers—D. J. Adams, Intervenor.
 No. 773.— { P. J. Pavy & Co. v. Brigitte Stelly et al.
 { Joseph Robin v. J. M. Thompson, Sheriff, et al.
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 No. 797.—Lalanne Brothers v. Kinchen, W. McKenry—T. C. Anderson, Intervenor.
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 No. —.— { Clarisse Roy, Widow, v. Ulger Roy, et al.
 { Clarisse Roy, Widow, v. Lastic Nizat et al.
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- No. 824.—John Marie Chirux v. Alcide Gonsoulin.
 No. 828.—V. Hebert et al. v. T. Hebert et al.
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 No. 821.—Pierre Gueydan v. Chairville Segura.
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 No. 818.—State v. Evariste Prejean.
 No. 815.—H. C. Warmoth, Governor, v. James Fry et al.
 No. 813.—Helen C. Houston, Wife, et al., v. David Hayes, Administrator.

No. 807.—O. Delahoussaye v. H. Delahoussaye et al.

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No. 801.—Austin Lacombe v. Board of Police of the town of Opelousa.

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No. 423.—Charles C. Edey v. City of Shreveport.

No. 419.—Steers & Carlton v. City of Shreveport.

No. 418.—Gregg & Ford v. same.

No. 414.—George Dillard and al. v. same.

No. 422.—William Johnston & Co. v. same.

No. 420.—S. B. Steers v. same.

No. 383.—Stephen Croom, Administrator, v. Jere Johnson and al.

No. 315.—Blanchin & Giraud v. Samuel Whited and al.

No. 386.—J. T. Daves v. R. H. Ward.

No. 431.—H. G. Hall v. J. M. Ford.

No. 385.—John Henry & Co. v. McCord & Co.

No. 337.—R. L. Gilmer v. Ritter Hettler.

No. 391.—Martin, Cobb & Co. v. O. Heffner and al.

No. 406.—C. H. Morrison v. S. W. Downs.

No. 322.—John Wheeler et al. v. A. B. Wood et al.

No. 390.—Tutorship of the minors, C. G. and M. L. Nugent. Final account.

No. 399.—E. M. Campbell v. R. P. Edwards and wife.

No. 292.—Succession of Felix Lewis.

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APPEAL.

1. The loss of an appeal bond being established, secondary evidence, either written or oral, may be introduced to prove the alleged signature of the defendant to the bond as surety.

Cincinnati Insurance Company v. Harrison et al., 1.

2. Where, on the third of December, 1872, judgment was rendered by the Eighth District Court, parish of Orleans, dissolving the injunction granted by that court, and dismissing the suit, and said judgment was not signed until the second of January, 1873, after the case was transferred to the Superior District Court recently created, and where on appeal a motion was made to dismiss the same on the ground that the judgment rendered did not require signature, and no appeal could therefore be taken after the lapse of ten days from its rendition: Held—That the judgment dissolving the injunction and dismissing the suit was a final one, and no appeal could be taken from it until it was signed, which was on the second of January, 1873, and that the appeal was properly made returnable within ten days from that date. *State v. Wharton et al.*, 2.
3. Where the affidavit of the appellant declares that, as a member of the State Election Returning Board, his pecuniary interest in the suit exceeds one thousand dollars, and where a reference to act No. 72 of 1871, p. 152, shows that an appropriation was made for the compensation of the same returning officers: Held—That this mode of establishing an appealable interest under such circumstances is fully sanctioned by our jurisprudence. *Ibid.*
4. Where the matter in dispute involved in the suit is such as to demand or authorize the action of this court, the right to appeal is granted by article 571 C. P. to third persons who allege that they are aggrieved by the judgment rendered in a suit between other parties. The law does not say that such judgment shall be *res judicata* against the third persons to entitle them to appeal. *Ibid.*
5. The appeal must be sustained where, as in this case, the appellant has made the requisite allegations supported by his affidavit, and has made it apparent that he is aggrieved by the judgment appealed from, which annuls the authority by which he was declared to be elected Attorney General of the State, whose salary is five thousand dollars per annum, and sets aside the return of the election board which is the foundation of his title to office.

Ibid.

APPEAL—Continued.

23. Where the motion was to dismiss the appeal, on the ground that the amount in dispute did not exceed five hundred dollars: Held—That the suit being for one thousand dollars against three heirs who are in possession of the estate they inherited, for services rendered as attorney in settling the succession, and judgment having been asked and granted in the court *a qua* against them jointly for said sum, in proportion to the respective shares received by them, the motion must be overruled, because the claim, as stated, is one against the succession, and the fact that there are several heirs who must pay proportionately, does not change the nature and amount of the matter in dispute.

Lartigue v. Clara White, 291.

24. Where judgment being rendered in this case on the sixth of May, 1872, in favor of defendants, an appeal was granted on the fourteenth of the same month, returnable on the first Monday in November, on motion to dismiss the appeal on the ground that said first Monday in November was not the legal return day: Held—That the first return day after this appeal was taken, being the third Monday in May, that the judgment having been rendered on the tenth of the same month, and that the transcript of the case containing over two hundred pages, it must be presumed that the judge *a quo* thought it could not have been completed by that time, as the court adjourns before the first of June to the first Monday in November, and it follows that the first Monday in November was the proper return day.

Goodwyn v. Perry et al., 292.

25. Where the appeal was taken by the plaintiff from a judgment dissolving an injunction without damages, and in his petition of appeal plaintiff prayed for citation against the defendants only: Held—That the motion to dismiss the appeal on the ground that all the parties in interest were not made parties to the appeal, must be overruled. It was not necessary that the surety on the injunction bond should have been made a party to the appeal.

Batalora v. Erath, 318.

26. Where the incompleteness of the record is due to a fault attributable to the clerk and not to the appellant, the appeal will not be dismissed on that ground.

City of Baltimore v. Parlange, 335.

27. It is useless to issue a *certiorari*, where the appellant has filed a certified copy of the missing document, so that the case can be examined.

Ibid.

28. Where the claim of plaintiff was for about \$478, principal and interest, at the institution of the suit, and was alleged to be the hire paid in advance, under a charter party, for a steamboat, which

APPEAL—Continued.

was lost, and where the defendant reconvened, claiming \$10,200, the value of the boat: Held—That the motion to dismiss the appeal for want of jurisdiction, must prevail. The real matter in dispute is less than \$500. The charter party is not the matter in dispute. The demand, it is true, grows out of the charter party, but it is simply to recover back a certain sum paid under the provisions of the charter party; and the right to recover back, as alleged, springs from a cause outside of the charter party, and the existence, or validity, or the enforcement, of the charter party, is not involved in plaintiff's demand. Besides, no appeal has been taken in relation to the reconventional demand.

Blanchard v. Kenison, 385.

29. The motion to dismiss the appeal must prevail, where the appellant has lost his right to the suspensive appeal by failing to furnish the required bond within the time prescribed by law, and where the amount of bond not having been fixed by the judge, he can not avail himself of a devolutive appeal.

Dwight v. Barrow, 424.

30. The appellee is not entitled to notice of the order of appeal, where it was granted on the mandamus of this court, and relates back to the time the appeal was denied on the trial of the rule, contradictorily with the parties to the suit.

State, ex rel. Nixon, v. Graham, 433.

31. A statement of facts signed by the relator, "to facilitate the trial and to be used on the trial in the Supreme Court," would be sufficient to dispense with a citation of appeal on said relator. *Ibid.*

32. It is unnecessary to inquire whether the note subscribed in January, 1868, by Eugenie Deyris and her daughter, Clara Penn, was a joint or solidary obligation, because the court gave judgment on it against them jointly, and this judgment can not be increased by holding it to be a solidary obligation, for the reason that the plaintiff and appellee has not prayed for the amendment of the judgment.

Seyburn v. Deyris, 483.

33. Where the appellant, since the appeal was taken, has paid the judgment in favor of any of the appellees, this is an abandonment of the appeal as to them.

Hall et al. v. Chachere, 493.

34. Where, on the verdict of the jury being rendered, the defendant moved for a new trial, which was refused, and an appeal was then asked for and granted, and the appeal bond filed, all prior to the date of the judgment as entered on the minutes of the court, in consequence of which a motion was made to dismiss the appeal on the ground that it was premature, having been applied for and granted before the judgment was rendered, and that the bond is defective and without force, because it was given before the judg-

APPEAL—Continued.

23. Where the motion was to dismiss the appeal, on the ground that the amount in dispute did not exceed five hundred dollars: Held—That the suit being for one thousand dollars against three heirs who are in possession of the estate they inherited, for services rendered as attorney in settling the succession, and judgment having been asked and granted in the court *a qua* against them jointly for said sum, in proportion to the respective shares received by them, the motion must be overruled, because the claim, as stated, is one against the succession, and the fact that there are several heirs who must pay proportionately, does not change the nature and amount of the matter in dispute.

Lartigue v. Clara White, 291.

24. Where judgment being rendered in this case on the sixth of May, 1872, in favor of defendants, an appeal was granted on the fourteenth of the same month, returnable on the first Monday in November, on motion to dismiss the appeal on the ground that said first Monday in November was not the legal return day: Held—That the first return day after this appeal was taken, being the third Monday in May, that the judgment having been rendered on the tenth of the same month, and that the transcript of the case containing over two hundred pages, it must be presumed that the judge *a quo* thought it could not have been completed by that time, as the court adjourns before the first of June to the first Monday in November, and it follows that the first Monday in November was the proper return day.

Goodwyn v. Perry et al., 292.

25. Where the appeal was taken by the plaintiff from a judgment dissolving an injunction without damages, and in his petition of appeal plaintiff prayed for citation against the defendants only: Held—That the motion to dismiss the appeal on the ground that all the parties in interest were not made parties to the appeal, must be overruled. It was not necessary that the surety on the injunction bond should have been made a party to the appeal.

Batalora v. Erath, 318.

26. Where the incompleteness of the record is due to a fault attributable to the clerk and not to the appellant, the appeal will not be dismissed on that ground.

City of Baltimore v. Parlange, 335.

27. It is useless to issue a *certiorari*, where the appellant has filed a certified copy of the missing document, so that the case can be examined.

Ibid.

28. Where the claim of plaintiff was for about \$478, principal and interest, at the institution of the suit, and was alleged to be the hire paid in advance, under a charter party, for a steamboat, which

APPEAL—Continued.

41. A third party, appealing from a judgment, must allege and show a direct pecuniary interest in the subject matter of the suit.

State ex rel. Blackmore v. Graham, 625.

42. No appeal is to be entertained from an order allowing an intervenor, as owner, to bond property provisionally seized. The right to do so is expressly conferred by law (section 2915 R. S.); and the judge *a quo* had no discretion but to grant the order—the bond furnished taking the place of the property released. There can therefore be no irreparable injury resulting from the granting of the order, and the law has provided ample remedy in case the order should not be properly executed. An appeal would be without practical benefit.

Jennings v. McConnico, 651.

43. When an injunction issues against an order of seizure and sale, and a suspensive appeal is taken from the judgment dissolving the injunction, the amount of the bond must be measured not by the amount involved in the injunction suit, but by the amount of the judgment ordering the seizure and sale staid by the injunction.

State ex rel. Richardson v. Judge of the Fourteenth Judicial District Court, 653.

44. It is not considered that the import of a suspensive appeal in such a case has any other effect than that of suspending the original order of sale. The judgment dissolving the injunction does not constitute a separate, independent judgment, that could be appealed from for any other purpose than that of affecting the original order of seizure and sale.

Ibid.

45. A suspensive appeal being in force, respondents in this case conceded nothing in releasing the seizure of the relator's property for thirty days on his promise to pay the amount of the judgment rendered against him, with interest and costs. They had no right whatever to execute the judgment pending the suspensive appeal.

State ex rel. Lacroix v. Judge of the Fifth District Court, parish of Orleans, 664.

46. Therefore the promise insisted on was a mere *nudum pactum*, which could no more defeat the appeal than a like promise not to take an appeal could defeat one subsequently taken according to law.

Ibid.

47. The delays for filing an appeal only run when this Court is sitting. It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. If he neglect so to do, the Court is without means of reviewing the case, and the appeal will be dismissed.

State ex rel. Magloire v. Barbin, 667.

SEE WALLS IN COMMON NO. 2—*State ex rel. D'Arcy v. Judge of the Fourth District Court, parish of Orleans*, 621.

ADOPTION.

SEE TUTOR AND TUTORSHIP, No. 10.

[*Succession of Forstall*, 430.]

ATTORNEY GENERAL.

SEE OFFICE AND OFFICERS.

ADMINISTRATOR.

SEE EXECUTOR.

ADMINISTRATOR (PUBLIC.)

1. The exhibition of a decree of the court in which the succession was opened, authorizing plaintiff to administer the same according to law in his capacity of public administrator, and, as such, an officer of the parish as well as of the court, must be held as at least a *prima facie* showing of capacity and authority to sue and stand in judgment in another parish. *Morse v. Griffith*, 213.
2. Where on the application of the public administrator of a parish, praying to be appointed administrator of a vacant estate, and to be authorized as such to institute all the proceedings required by law, the parish judge refused to take any judicial action in relation to the same, because a person representing himself to be the brother and the heir of the deceased had appeared, praying to be appointed administrator of said estate, and because such being the case, it was believed by the court that the public administrator had no right to have his prayer complied with. Held—That the judge *a quo* erred. The application of the public administrator should have been filed, and, after due notice given, tried contradictorily with the application of any other party, and the rights of all the parties settled by a judicial decree.

State ex rel. Leonard v. Parish Judge of the Parish of Plaquemines, 329.

3. No proceeding can be had, under the intrusion act, to remove the defendant from the office of public administrator, on the ground that said office has ceased to exist by virtue of the repeal of the law creating it. The case presented by the relator does not fall within the provisions of the statute.

State ex rel. Hunter v. Hawley, 487.

AGENT.

SEE PRINCIPAL.

SEE PLEADINGS AND PRACTICE.

ACTION.

1. The appointment of persons to represent parties to a suit should be made with caution and in cases clearly designated.

Holbrook v. Bronson, 51.

2. Where the plaintiff claims property by inheritance as sole heir of his father and appends to his petition an order of the proper court recognizing him as such, and decreeing that he be put in possession

ACTION—Continued.

of his father's estate, and where he alleges that his father had a just and legal title to the property at the time of his decease and was in possession at that time: Held—That the allegations are sufficiently clear to enable him to maintain his action, and that an exception to plaintiff's petition on the ground of its vagueness and failure to set out the title under which he claims can not be maintained. It is for him to make out his case by sufficient evidence which the defendant is free to resist when presented.

Chavanne v. Frizola, 76.

3. There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court.

Blair & Co. v. Taylor et al., 144.

4. Article 55 Code of Practice, forbids the cumulation of petitory and possessory actions, except by consent of parties.

St. Amand v. Long, 164.

5. In a possessory action title is not at issue, and judgment should not be given on the titles of the parties. *Ibid.*

6. The prayer of a petition characterizes it, and when the action it institutes is possessory, the defendant can not change it into a petitory one, and reconvene by setting up title. *Ibid.*

7. Where there is no answer to an amended petition, nor default taken, especially if the amendment be one of substance and not one of form, all subsequent proceedings are irregular and will be set aside. The *contestatio litis*, which is the very foundation of a suit, did not exist. *Ibid.*

8. Where the husband has not appeared with his wife, in the suit instituted by her, the latter must show his authorization. Her own averments, or those of her counsel as to that fact are not sufficient.

Sommers v. Schmidt, 193.

9. Where the husband joins the wife in her petition, this is sufficient authorization to her to sue.

Succession of Payne, 202.

10. Where the defendant objected to the refusal of the judge *a quo* to charge the jury that actions for divorce are governed exclusively by section 1192, Revised Statutes: Held—That the judge committed no error, and the action is instituted under article 138 C. C., amended by act No. 76, Statutes of 1870. Where plaintiff was authorized to institute the suit, it followed that she was empowered to take a writ of sequestration or such other conservatory steps as were necessary to secure her rights.

Michel v. Wiel, 208.

ACTION—Continued.

11. The law reprobates a multiplicity of actions and aims at protecting parties against the annoyance of repeated lawsuits in regard to the same subject matter. *Stafford v. Stafford*, 223.
12. There is no ground for a call in warranty in a case of trespass, and hence there is no right of action against warrantors.
Coco v. Hardie, 230.
13. Where in the motion to appoint a curator *ad hoc* to the defendant, who is a non-resident, it is simply stated that he is absent and not represented, and where said defendant has not been proceeded against by attachment, and it has not been alleged or proved that he has or had, when the suit was instituted, any property within the jurisdiction of the court before whom the suit was brought: Held—That this is not sufficient, and that the suit can not be maintained.
Rogay v. Juilliard, 305.
14. Where there was no necessity for a citation, but where the plaintiff and opponent had been formally summoned by the defendant, to oppose his account as executor of a succession, if he thought proper, and to present his opposition within ten days: Held—That said defendant could not invoke judicial action in the matter to the prejudice of plaintiff and opponent before the specified day had expired. Hence, the order of homologation having been rendered after three days delay only, was null, and no action of nullity is necessary to set it aside.
Succession of Hogan, 331.
15. The second mortgage creditor has no action against the prior mortgage creditor for the balance remaining in the sheriff's hands, or the hands of the purchaser, and the plaintiff, who gets his judgment paid, has no right to object to the payment of the second mortgage.
City of Baltimore v. Parlange, 335.
16. Where the exception was that the suit is premature, because it is an effort to make the courts declare, in advance, that the defendant, after the year 1875, shall not be permitted to exercise the privileges of a corporation under an act extending its existence until 1895, and alleged to be unconstitutional; that its present exercise of privileges is not alleged to be illegal; and that the suit, therefore, can not be maintained, if at all, until the alleged date of the expiration of its present privileges in 1875: Held—That said exception is well taken.
State v. New Orleans Gaslight Company, 398.
17. Where the exception is that the petition discloses no cause of action: Held—That for the purpose of trying this exception, all the allegations being taken as true, show ample cause of action.
Succession of Milton Taylor, 446.
18. The jurisdiction of the court of the parish where property is sought to be made liable in an hypothecary action, can not be questioned.
Gantt v. Eaton et al., 50

ATTACHMENT.

1. Where defendant contended that the terms "will convert," instead of "is about to convert" her property into money, is too vague and indefinite to authorize the attachment against her: Held—That the allegations and affidavit in this case substantially comply with the law and justified the attachment. The essential part of the law is not that the debtor is about to convert her property into money, for there is no wrong in that, but that she will do so, "with the intent to place it beyond the reach of her creditors."

Frere v. Perret, 500.

2. The formalities required by law in attachment suits must be strictly observed—the posting of copies of the attachment and citation so as to give notice to the public, and the door of the courtroom is mentioned as the place. But the construction of the courthouse may be such as to make the posting at the entrance leading to the door of the courtroom a legal posting. The objection raised in this case is too technical.

Cornell v. Meddock, 590.

SEE BOND.

BILLS AND PROMISSORY NOTES.

1. Where A gives an accommodation check to B in exchange for B's check, the fact that B's check is not paid does not release A from the liabilities attaching to his own check, as soon as it is received by an innocent third party as cash.

Crescent City Bank v. Hernandez, 43.

2. The rights which become vested when a check is deposited can not be prejudiced by what happens after that time between the original parties.

Ibid.

3. Where a certificate of indebtedness with the date and number wanting was stolen, while being prepared for issuance, before it was issued and put in the market by the city of New Orleans, and after the date and number had been subsequently forged, was sold to the defendant, who called his vendor in warranty: Held—That this instrument can not be classed as negotiable paper upon which the maker is bound to innocent holders. It is transferable, it is true, but the transferee obtains only the rights of the transferor. In this case the transferrers and warrantors had no legal possession of the certificate of indebtedness of which the city of New Orleans never ceased to be the owner.

City of New Orleans v. Strauss, 50.

4. Where a notary stated in his certificate that the notice of protest was served at the residence of the indorser in the hands of his wife, and it appears by the indorser's testimony that he received the notice, a mistake as to the name of a street in designating the locality for the residence will not be fatal.

Cadillon v. Rodriguez et al., 79.

BILLS AND PROMISSORY NOTES—Continued.

5. Where the evidence shows that the indorser was temporarily absent from New Orleans, at which place he resided, and where his family remained during his absence; that a notice of protest, intended for the indorser, was given to one Gasquet, his son-in-law, at said Gasquet's office, and that the indorser never received the notice: Held—That this is no notice and that the indorser is discharged. *Bank of New Orleans v. Millaudon*, 280.
 6. Whether there was a consideration or not between the makers and the payee of certain promissory notes, the makers were liable to the indorsees who acquired the notes before due and gave a valuable consideration therefor. *Battalora v. Erath*, 318.
 7. Whether a blank was filled up, before or after the signing of the notes, can not affect the indorsees who knew nothing thereof and who acted in perfect good faith. *Ibid.*
 8. Where a note was protested through error on one day, and was paid early on the next day, and, although there was carelessness on the part of the bank, no actual injury or damage was proved to have been caused thereby to the plaintiff, who was the drawer of the note: Held—That the verdict and judgment for five hundred dollars in the court *a qua* in favor of plaintiff was clearly erroneous. *Lalaurie v. Southern Bank*, 330.
 9. Where the defendant bought certain slaves, who, by the will of one of their former owners, were to be emancipated at a future time, but were not so emancipated by the defendant, who made no efforts to surmount the obstacles that were in the way of their emancipation, but who was content to retain them in the condition of slavery, and to avail themselves of their labor until they were set free by the Government of the United States: Held—That said defendant has no legal ground to refuse to pay the promissory note which he gave for the purchase of said slaves. *Poydras v. Poydras*, 405.
 10. Where a note was paid by anticipation, the payment extinguished the mortgage which was given to secure it. It was an accessory to the contract, and fell when the debt was paid. *Hoyle v. Cazabat*, 438.
 11. The plaintiff can not recover against an indorser, when it is in evidence that the consideration of the indorsement was a slave. *Duperier v. Darby*, 477.
 12. As to the question whether interest should be allowed on the notes given for the interest on the mortgage claim, it is determined in the affirmative. By these notes the interest forming the consideration was capitalized. It was a valid consideration for the debt, evidenced by these notes, and there can be no reason why they should not bear interest. *Seyburn v. Deyris*, 483.
- SEE EVIDENCE, No. 23—*Guillory v. Déjean*, 481.
- SEE SUBROGATION—*Durac v. Ferrari*, 80.

BANKRUPTCY.

1. A having made a surrender in bankruptcy and become a discharged bankrupt, whose property was sold by his assignee, a suit could not be instituted against him on certain mortgage notes reposing on said property; he was no longer a party in interest, and could not be represented in the case by the curator *ad hoc* appointed for that purpose and upon whom citation was served. Such proceedings were mere nullities. There was then no citation, and prescription took effect against the notes upon which the judgment was predicated. *Kennedy v. Rust*, 554.
2. Under the statutory provisions of the United States, the property of a bankrupt may be sold free of incumbrances by order of the bankrupt court. *Willard v. Brigham*, 600.
3. But to sell property free of incumbrances, the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts that justify the application, so that the judge may decide whether it shall be granted, and the secured creditor must be properly notified and summoned to appear and protect his interests. Otherwise, being the holder of a prior mortgage and not being a party to the proceedings, he would not have his rights affected thereby, and his hypothecary action, as in this case, would interrupt prescription, where notices were served upon the third possessor under the act of sale by the assignee. *Ibid.*
4. The property having passed out of the jurisdiction of the bankrupt court, it was useless to cite the assignee in a proceeding against the hypothecated property, because he had no interest therein; and it was also useless to cite the discharged bankrupt (the obligor), because he was no longer bound for the debt.

*Ibid.*SEE LAWS, No. 10—*Tate v. Laforest*, 187.**BILLS OF EXCEPTIONS.**

1. Objections not stated in a bill of exceptions will not be considered by this court. *Fuentes v. Gaines*, 85.
2. Where a motion as to the disqualifications of a grand juror, which rested on questions of facts, was overruled and no bill of exceptions taken: Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes. *State v. Branch*, 115.
3. Where the plaintiffs, appealing from the judgment of the court below, have assigned as error on the face of the record that the motion to dissolve an injunction having been overruled, an exception based on the same grounds could not have been acted upon by the judge *a quo* a second time: Held—That this court regards the document, called an exception, an answer, and that there existed no reason why the judge *a quo* could not pass upon the

BILLS OF EXCEPTIONS—Continued.

merits of the case, which he seems to have done, although he also calls an answer an exception. *Cheval v. St. Leon Destex*, 338.

4. Where the appellant referred to the written reasons of the judge *a quo* in refusing a new trial, for the facts in regard to the qualifications of a juror and the time at which appellant alleged he became aware of said facts: Held—That it does not appear that timely objection was raised, or a bill of exceptions reserved on this point, or an assignment of errors made on the record. The only mode of bringing the facts of a criminal cause in this respect before this court is by a bill of exceptions. *State v. Socha*, 417.

SEE APPEALS, INJUNCTION, SURETY.

SEE ACTION, No. 16—*State v. New Orleans Gaslight Company*, 398.

BONDS.

1. Where the liability for interest coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release for the bonds includes the liability for the coupons.

State v. North Louisiana and Texas Railroad Company, 65.

2. The objection that when the release bond in this case was signed on the first of July, 1868, there was no law authorizing the release on bond of property provisionally seized, is not well taken. It was authorized by the act of the sixth July, 1867. See Revised Statutes of 1870, sec. 1914. *Lepretre v. Barthet*, 124.

3. As a general rule the judicial surety, a solidary obligor, can not be proceeded against until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety. *Ibid.*

4. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond or release the surety. *Ibid.*

5. There is no law which directs a book to be kept in the parish recorders' offices for the recording of tutors' bonds, and this court is not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of a minor's mortgage, where in the same office are kept the books in which the law directs mortgages to be inscribed.

Fisher v. Tunnard, 179.

6. Where the motion to appeal was made in the name of the husband and the wife, the authorization to appeal is sufficiently established,

BONDS—Continued.

and the appeal bond can not be objected to, when made out in the name of the husband and the wife and is signed by both.

Succession of Payne, 202.

7. The case of *Block Brothers v. Burthe*, 20 An. p. 344, which, in the opinion of the judge *a quo*, covers the case at bar in every particular, was determined on the ground that the opponent was properly the defendant and had the right to release by bond, an act which could not be considered as operating an irreparable injury to the appellant. There seems to be a conflict between the case of *Block Brothers v. Burthe* and that of *Duperier v. Flanders*, 20 An. 29. The court, however, inclines to recognize the doctrine laid down in the latter case, and to follow the principles enunciated in the later case of *Dawson v. Williamson*, 22 An. 535, as controlling.

State ex rel. Gay et al. v. Judge of the Fourth District Court, parish of Orleans, 299.

8. A surety on an arrest bond can not escape his responsibility, because his principal has put himself beyond the jurisdiction of the court.

Rogay v. Juilliard, 305.

9. Where the amount of the attachment bond is less than one-half over and above the amount of the debt alleged to be owing, by less than one dollar, such a deficiency will not be noticed by this court. *De minimis non curat lex*.

Bodet et al. v. Nibourel, 499.

SEE EXECUTOR AND ADMINISTRATOR, 11, 12, 13—*Succession of Leontine Guilbeau*, 474.

SEE APPEAL, No. 39—*Sandel v. Douglas*, 564.

No. 40—*State ex rel. Silverstein v. Judge of the Fifth District Court, parish of Orleans*, 622.

CONTEMPT.

1. The penalty for not producing books and papers in obedience to a *subpena duces tecum*, is not imprisonment for contempt. The consequence of the disobedience is, that the party who has obtained the subpena has the right to ask that the facts which he states in his affidavit for the subpena be taken as proved.

Columbia Fire Company No. 5 v. Purcell, 283.

2. To use abusive language towards a member of the court and commit an assault upon his person during a recess, and in the court room, under the pretext of resenting what he had said or done when on the bench, is a contempt of court. An answer by the defendant to the rule to show cause why he should not be punished, which is substantially a justification of his act, must be regarded as an aggravation of the contempt.

State v. Garland, 532.

BILLS AND PROMISSORY NOTES—Continued.

5. Where the evidence shows that the indorser was temporarily absent from New Orleans, at which place he resided, and where his family remained during his absence, that a notice of protest, intended for the indorser, was given to one Gasquet, his son-in-law, at said Gasquet's office, and that the indorser never received the notice: Held—That this is no notice and that the indorser is discharged. *Bank of New Orleans v. Millaudon*, 230.
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2. The objection that when the release bond in this case was signed on the first of July, 1868, there was no law authorizing the release on bond of property provisionally seized, is not well taken. It was authorized by the act of the sixth July, 1867. See Revised Statutes of 1870, sec. 1914. *Lepretre v. Barthet*, 124.

3. As a general rule the judicial surety, a solidary obligor, can not be proceeded against until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety. *Ibid.*

4. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond or release the surety. *Ibid.*

5. There is no law which directs a book to be kept in the parish recorders' offices for the recording of tutors' bonds, and this court is not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of a minor's mortgage, where in the same office are kept the books in which the law directs mortgages to be inscribed.

Fisher v. Tunnard, 179.

6. Where the motion to appeal was made in the name of the husband and the wife, the authorization to appeal is sufficiently established,

BONDS—Continued.

and the appeal bond can not be objected to, when made out in the name of the husband and the wife and is signed by both.

Succession of Payne, 202.

7. The case of *Block Brothers v. Burthe*, 20 An. p. 344, which, in the opinion of the judge *a quo*, covers the case at bar in every particular, was determined on the ground that the opponent was properly the defendant and had the right to release by bond, an act which could not be considered as operating an irreparable injury to the appellant. There seems to be a conflict between the case of *Block Brothers v. Burthe* and that of *Duperier v. Flanders*, 20 An. 29. The court, however, inclines to recognize the doctrine laid down in the latter case, and to follow the principles enunciated in the later case of *Dawson v. Williamson*, 22 An. 535, as controlling.

State ex rel. Gay et al. v. Judge of the Fourth District Court, parish of Orleans, 299.

8. A surety on an arrest bond can not escape his responsibility, because his principal has put himself beyond the jurisdiction of the court.

Rogay v. Juilliard, 305.

9. Where the amount of the attachment bond is less than one-half over and above the amount of the debt alleged to be owing, by less than one dollar, such a deficiency will not be noticed by this court. *De minimis non curat lex*.

Bodet et al. v. Nibourel, 499.

SEE EXECUTOR AND ADMINISTRATOR, 11, 12, 13—*Succession of Leontine Guilbeau*, 474.

SEE APPEAL, No. 39—*Sandel v. Douglas*, 564.

No. 40—*State ex rel. Silverstein v. Judge of the Fifth District Court, parish of Orleans*, 622.

CONTEMPT.

1. The penalty for not producing books and papers in obedience to a *subpena duces tecum*, is not imprisonment for contempt. The consequence of the disobedience is, that the party who has obtained the subpena has the right to ask that the facts which he states in his affidavit for the subpena be taken as proved.

Columbia Fire Company No. 5 v. Purcell, 283.

2. To use abusive language towards a member of the court and commit an assault upon his person during a recess, and in the court room, under the pretext of resenting what he had said or done when on the bench, is a contempt of court. An answer by the defendant to the rule to show cause why he should not be punished, which is substantially a justification of his act, must be regarded as an aggravation of the contempt.

State v. Garland, 532.

CONFUSION.

1. Where it is admitted that the money claimed by plaintiffs was given to the defendant and her two children, and that by the act of their merchants and factors, the garnishees in this case, said money was placed to the sole credit of their mother, the defendant: Held—That this act did not divest the right of her children, the intervenors in this proceeding, and did not make the money garnished the sole property of defendant. There was no such confusion or mingling as affected the rights of the intervenors.

Jurey & Harris v. Hord et al., 465.

CONTRACT.

1. Where the allegations and the prayer of the petition and the evidence adduced make it clear that the action is predicated upon a contract, the plaintiff can not recover on a *quantum meruit*.

Mazureau & Hennen v. Morgan, 281.

2. In this case the contract relied on is in flagrant violation of the law, Statute of 1808, thirty-first of March. *Ibid.*

3. If, in a suit upon a contract, the party fail to prove the contract, but prove without objection the value of services rendered, a judgment might be rendered upon a *quantum meruit*. But when the contract is proved, it is the law between the parties, and the parties must succeed or fail according to the terms of that contract. The court is not at liberty to substitute another, based upon the presumed assent of the parties. *Ibid.*

4. The plaintiff's claim is inseparably connected with an unlawful contract, and must fall with it. *Ibid.*

5. Where a creditor, ignorant of the fact that his claim on his debtor was secured, wrote to other creditors of the same, expressing his assent to accepting concurrently with them the surrender of property offered on certain conditions by said debtor, because he believed that he was in no better condition than those creditors: Held—That this was a contract which was void from error in the motive, inasmuch as it proceeded from a cause supposed to exist, which in reality did not exist, and because its existence was a condition precedent to the contract.

Goodwyn v. Perry, 292.

6. Where the State Assessors have delivered to the Auditor the assessment roll and received in full their compensation for their services, the contract between them and the State for making the assessment is completely executed. The obligation of the State to pay them is discharged, and it can not afterwards be revived by any use the Auditor might make of said roll.

State ex rel. Board of Assessors v. Graham, 309.

7. A contract made prior to the adoption of the constitution of Louisiana, 1868, can not be affected by the provision contained in section 127 of that constitution. If the contract was valid then, it is

CONTRACT—Continued.

clear that this provision not only impairs but absolutely destroys its obligation within the meaning of the tenth section of the first article of the Constitution of the United States. Any judgment of a State court resting on such enactment of a State constitution, after the date of the contract, must be reversed in the Supreme Court of the United States. The reinscription of a mortgage on the granting of an extension of time for the payment of a note, without any consideration for such extension, or change in any other term or condition of the contract, can not be held to be an agreement requiring a stamp.

Henderson v. Merchants' Mutual Insurance Co., 343.

8. The civil government of the city of New Orleans can not be permitted to deny the rights derived by the relators in this case from their contract with said city, on the ground that it was under military authority at the time, when, after the cessation of that military authority, those rights have been, in part, frequently recognized and ratified by its ordinances. That contract was an entirety. The city had no right to sever its obligations, so as to ratify one part of the contract and reject another.

State ex rel. St. Charles street Railroad Co. v. Cockrem, 356.

9. The city, having for a number of years received without objection the consideration of the contract, should not be heard when disputing the contract itself. *Ibid.*
10. The plea that the parties had forfeited the right of way by voluntarily abandoning the construction of railroads in certain streets and by failing to construct said roads within the time limited by the contract, is not made out, when proved that they were prohibited to do the work by an injunction from a third party; and because the injunction taken in September, 1866, was not dissolved before June, 1872, it is not to be inferred that it was kept so long in force by the wish and connivance of the relators, when the city was a party to the injunction suit, and having the same right to push the case that the relators had, did not do so. *Ibid.*
11. The city surveyor was bound, when called upon, to furnish the requisite lines and levels for the building of the road—a ministerial duty which was imposed upon him by the sixth section of the original ordinance authorizing the construction of the road. *Ibid.*
12. The fact that the limit to which supplies might have been required according to contract, was not reached, does not amount to a violation of, or a refusal to comply with the contract, where there is no evidence that the plaintiff was called on and refused to furnish more than is claimed by him in his suit.

Lalanne v. Goodbee, 481.

CONTRACT—Continued.

13. This is an action to set aside the pretended transfer of a suit on the ground that it was the sale of a litigious right in contravention of article 2447 of the Revised Code. It is the actual intention of the parties, and not the form of the instrument, that determines the character of the contract. *Kennedy v. Morrison*, 605.
14. Article 2447, Revised Code, did not preclude Morrison, one of the defendants in this case, from making a contract with Kennedy, the plaintiff, for the compromise and settlement of the suit which the latter was prosecuting against him. Farmer, attorney at law, also one of the defendants in the present case, was merely a party interposed, and acquired no rights whatever under the settlement. Morrison gave the consideration under the settlement, and Kennedy transferred the suit for the purpose of having it dismissed. *Ibid.*
15. But even if Farmer had paid the price, or given the consideration, it would not have been the sale of a litigious right in the sense of article 2447, because the purchase was made, not to carry on the litigation, but to end it. *Ibid.*
16. Assuming that the sale or transfer of the suit was actually made to Farmer, there is an insurmountable obstacle in plaintiff's way. He has not returned, nor offered to return, the consideration which he received. He can not keep the fruits of the transfer, even though it be the sale of a litigious right, and ask to be restored to the ownership of the thing which he transferred. *Ibid.*
17. The plaintiff in this case is bound by the modified contract to which he gave his assent, and by his own interpretation of it. The city is not in default, and consequently not liable in damages. *Thomas v. City of New Orleans*, 660.

CRIMINAL LAW AND PRACTICE.

1. Where a bill of exceptions was taken to the refusal of the judge to charge the jury as requested, that if they entertained a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they were bound to acquit him, and the judge charged, on the contrary, that the law presumed the sanity of every man, and that it devolved on the prisoner, under a plea of insanity, to satisfy the jury by a preponderance of proof that he was insane at the time of the alleged act: Held—That the exception was properly overruled. *State v. Burns*, 302.
2. Where the exception was to the ruling of the court permitting an indictment to be amended by inserting the value of the mule alleged to have been stolen: Held—That it was not necessary that the value of the animal should have been set forth in the indictment. The amendment added nothing to the validity of the

CRIMINAL LAW AND PRACTICE—Continued.

instrument, nor did it in any manner vitiate it. *Utile per inutile non vitiatur.* *State v. Wells, 372.*

3. The statute of Louisiana authorizing prosecutions by the district attorney on information is not in conflict with the fifth amendment to the constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury." The restriction by this amendment has no application to State courts. *State v. Kelly, 381.*

4. Where the accused, on his being brought to the bar in the custody of the sheriff, is ready for his trial, it is to be presumed that if he has no counsel and does not ask the court to assign him one, he chooses to be heard in his own defense. *Ibid.*

5. The fact that, on his application for a new trial, he stated that he was without counsel and was thus unable to defend himself, is no reason why this court should reverse the judgment which was based upon the verdict of a jury. *Ibid.*

6. When the offense with which the prisoner was charged consisted in his having entered a vessel in the day time with intent to steal, it was not necessary that the information should have recited and described the precise article which he intended to steal. It is sufficient if the indictment is drawn up in accordance with the statute on this subject. R. S. sec. 854. *Ibid.*

7. Until the jury box is exhausted the jury may be drawn therefrom, even though fifteen months have elapsed since the list of jurors was furnished by the sheriff. The form of indictment is sufficient where it fully apprises the accused of the crime with which he is charged. *State v. Petrie, 386.*

8. When the judge *a quo* had already charged the jury that "they must be satisfied that the prisoner knew the certificates he published as true were false at the time of passing them, and that if they had any reasonable doubt of his guilt, they must acquit him:" Held—That this was substantially the charge asked for by defendant's counsel, though not identical in language, and that it met all the requirements of the law. *State v. Carr, 407.*

9. Where the judge *a quo* refused to charge the jury, as requested, that "the fact that defendant had offered no evidence is in no way to be taken as an admission of guilt," instead of which the judge charged "that all circumstances against the prisoner within his power to explain, which he refused to do, were to be taken and weighed by the jury as circumstances against the prisoner:" Held—That this was an error. The accused is justified in relying, if he chooses, upon the insufficiency of the evidence adduced by the prosecution, and his so doing should not be taken as an acknowledgment by him of his guilt. *Ibid.*

CRIMINAL LAW AND PRACTICE—Continued.

10. Section 10 of act 73 of 1872 does not so far abrogate section 833, Revised Statutes of 1870, that a person may not be indicted under the former, as was done in this case, for "publishing as true, false, forged and counterfeited certificates of a public officer," etc. Both laws are easily construed so as to give effect to each, and will support an indictment, if properly drawn up under each respectively. *Ibid.*
11. The indictment properly sets forth the offense of which the prisoner is accused, as described in section 833, Revised Statutes of 1870, under which said indictment is drawn, and is not defective in substance. It follows substantially, if not literally, the language of said section. *Ibid.*
12. Where the defendants were fully informed by the allegations of the indictment of the offense with which they were charged, it was unnecessary to allege also the common law ingredients of the crime of rape, with the intent to commit which the accompanying offense of burglary was charged. *State v. Jean Gay, 472.*
13. The duty imposed by law with regard to the venire of the jury is ministerial, and one which can be performed by a deputy of one of the specified officers, when legally appointed. *Ibid.*
14. The challenge to a juror, whose native tongue was the French, and who did not understand the English language, was properly sustained. *Ibid.*
15. The proceedings of the court are required to be conducted in the English language—and the fact that the judge, counsel, witnesses, and accused understand and speak other languages can not dispense with this requirement. Jurors, to be competent, must be able to understand all the pleadings and proceedings, as they must be considered by them. *Ibid.*
16. The right of the State to challenge without cause is limited to the number six, whatever may be the number of defendants joined in the indictment. *Ibid.*
17. It makes no difference whether an accomplice, who becomes a witness, has been convicted or not, or whether he be joined or not, in the same indictment with the prisoner to be tried, provided he be not put upon his trial at the same time. *State v. Prudhomme et al., 522.*
18. The circumstance of the witness being an accomplice of the party on trial, affects his credibility only, of which the jury are to judge. *Ibid.*
19. Under the laws of this State, all parties present, aiding and abetting in the commission of a felony, are principals therein. If the principle which prevents an accomplice to testify, be so restricted as to exclude all principals, it would have little practical importance. *Ibid.*

CRIMINAL LAW AND PRACTICE—Continued.

20. A jury may convict on the uncorroborated testimony of an accomplice; they are the judges of his credibility. The rule requiring the judge to charge the jury that the testimony of an accomplice needs confirmation is rather a rule of practice than a rule of law.
Ibid.
21. A judgment decreeing imprisonment for life is not unauthorized by law, because the words "hard labor" are omitted in it. The words are not sacramental. They would add but little to the efficacy of the judgment.
Ibid.
22. An indictment charging that defendants received the property stolen with a felonious intent knowing the same to have been stolen at the time, is in sufficient conformity with the statute.
State v. Allemand, 525.
23. Where a motion for a new trial and one in arrest of judgment were predicated upon the hypothesis that only forty-six jurors were drawn on the panel: Held—That inasmuch as no objection was made to the jury until after conviction, the refusal of the judge *a quo* to grant a new trial or to arrest the judgment was correct, even if the facts were as supposed. One can not take the chances of a verdict in his favor, and after conviction object to the jury.
State v. Jackson et al., 537.
24. The fact that a juror was for a moment out of the presence of the officer under whose charge he was, when it does not appear that he had any communication with any other person, does not necessarily establish the presumption of misconduct, and make it obligatory upon this court to set aside the verdict of the jury.
State v. Turner et al., 573.
25. In the copy of the indictment served upon the prisoners in this case, the name of one of the jurors, which is "Philip Darden," appeared as "Dauden." The objection on this point was correctly overruled. It is not shown how this trifling error has prejudiced the prisoners, and this court does not see how it could have had this effect.
Ibid.
26. Where, on the prosecutrix being offered as a witness by the State, she was interrogated in chief, cross-examined by the defense, re-examined by the State, and then sought to be recross-examined by the defense: Held—That the court properly refused this to be done, if the re-examination on the part of the State was confined to such matters as the cross-examination drew out.
Ibid.
27. A motion in arrest of judgment will not prevail, on the ground that the judge excused two persons from serving on the jury, who had been summoned as jurors, and who were not exempt under the law. This objection should have been made when the jury were being impaneled.
Ibid.

CRIMINAL LAW AND PRACTICE—Continued.

28. The erasure of the name "Albert" and the interlineation of that of "John" in the indictment is not a good ground in arrest of judgment. The accused was identified as the party who committed the crime, and whether he committed it in the name of Albert or John matters nothing to justice. The district attorney swears that the change in the name was made on the day the prisoner was arraigned. The court was then authorized at any time to have its records corrected, so as to make them conform to the facts. *Ibid.*
29. There is nothing in the objection that some of the jurors who served on the jury do not appear on the *venire*, or list of the jurors drawn to serve for that term of the court. It should have been made before the trial was entered upon and while the jury was being impaneled. The prisoners took the chance of the jury; they must take the verdict. *Ibid.*
30. The proposition urged, on the motion for a new trial, that the court refused to charge the jury, as requested, that it is necessary to prove both penetration and emission to make out the crime of rape, is monstrous. It is the penetration which destroys the victim and constitutes the crime, and not the consummation of the violator's lust. Technicalities which have the tendency to make the criminal laws of the country a shield, instead of a terror, to evil doers, can not be countenanced by this court. *Ibid.*

SEE SHERIFF.

CONSTITUTION AND CONSTITUTIONAL LAW.

1. A police juryman is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office.
State ex rel. Gorham v. Montgomery, 138.
2. There is no prohibition in the constitution against the sale of property for taxes in lots of from ten to fifty acres, or any other quantity. The fact that the constitution directs that all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres, does not inhibit the legislature from directing lands sold under other process to be similarly divided.
Gay v. Hebert, 196.
3. The homestead law, exempting certain property from seizure on a judgment enforcing a mere ordinary debt, is not unconstitutional. The rights of the creditor, and not his security, unless the security forms part of his contract, must be invaded before he can invoke the constitutional privilege on which he relies. The law, in this case, does not affect his vested rights, but only impairs his security for the payment of his claim.
Robert v. Coco, 199.

CONSTITUTION AND CONSTITUTIONAL LAW—Continued.

4. The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason, therefore, to maintain that article 61 of that instrument refers only to the regular or annual sessions of the General Assembly in relation to executive appointments.

State ex rel. Morgan v. Kennard, 238.

5. The provisions of the act of the Legislature, No. 39, 1873, for transferring cases are not repugnant to articles 83, 90, and 114 of the State Constitution.

Kemp v. Ellis, 253.

6. The amendment of the constitution of the State, ratified on November 7, 1870, which limits the State debt to \$25,000,000, is not violated by the law creating the Levee Company. The bonds of the State are not out, nor is any one its creditor, nor can any one become its creditor, for any sum contracted by the Levee Company.

State ex rel. Louisiana Levee Company v. Clinton, 401.

7. It is not for the court, in this case, to determine that the payments demanded are, or are not, without a valid consideration. It has only to decide whether the acts relating to the Levee Board are constitutional or not.

Ibid.

8. The act No. 27, 1871, which ratifies and confirms the contract between the Levee Company and the Governor, is, after all, an act of the Legislature, and is valid unless conflicting with the constitution of the State, and this has not been shown.

Ibid.

9. The question on the merits presented in this suit is identical with the one decided in the case of the *State ex rel. Salomon & Simpson* against the same defendant, 23 An. 402. The State debt exceeded the constitutional limitation of \$25,000,000 at the time the act for the relief of the relator was passed, and created a debt in his favor. His claim therefore can not be enforced.

State ex rel. Nixon v. Graham, 433.

10. Where the debt and contract on which a judgment was obtained existed prior to the Constitution of 1868, article 132 of that instrument is not applicable, and, therefore, the judgment does not fall within the provisions of the act No. 40, approved February 24, 1869. Article 132 of the Constitution is not self-acting, and can only have effect in the manner provided by statute.

Morrison v. Flourney, 545.

11. The fact whether or not a law has been duly promulgated may be within the province of the judiciary, but whether or not it went regularly through all the stages necessary for its passage as a law up to the promulgation, is a subject confined to other departments of the constitution.

Whited v. Lewis, 563.

CONSTITUTION AND CONSTITUTIONAL LAW—Continued.

12. The eleventh section of act 81 of the regular session of 1872, promulgated on the thirteenth April, 1873, amending the charter of the town of Monroe, was not passed in violation of the formalities required by the constitution. The objects embraced in said section of said act are embraced in the title. *Ibid.*
13. In 6 An., 605, it is said: "When portions of a law come within the reasonable intendment of its title, and others do not, the latter alone are unconstitutional, provided they can stand alone." This properly applies to the aforesaid section. *Ibid.*
14. The right of a party to raise the question of the constitutionality of a law is limited to the provisions thereof which affect his interest in the litigation. *Ibid.*
15. Where it was contended that section 3493, R. S., did not authorize the Secretary of State to promulgate an act of the Legislature that had not received the Executive sanction, as was the case in this suit: Held—That this is too restricted an interpretation of the functions of the Secretary of State when connected with article 66 of the constitution. *Ibid.*
16. The act in question was necessarily presented to the Governor, but was published without his signature. Although not drawn up with such precision and fullness as might be done, a fair construction of section 3493, R. S., in the light of the various articles of the constitution having any reference to the subject, will afford authority in the Secretary of State to deliver to the State Printer for publication all bills in the category of this one, with the statement that they became laws without the signature of the Governor. *Ibid.*
17. A bill becoming a law without the Governor's signature must be promulgated as well as one with his signature, and all bills must be promulgated through the office of the Secretary of State. *Ibid.*
18. It may not be sacramental, under existing legislation, that he shall state, or add in a note, that it became a law without the signature of the Governor, and how it so happened; but the court can not say that, under all the provisions of the constitution and the laws on the subject, his doing so will destroy the law or prevent a bill in such a contingency from becoming a law. *Ibid.*
19. A political corporation can not make a contract in violation of the law of its incorporation. Under a title purporting to amend only the first section of a statute, it is not competent to amend other sections of said act. Such amendments not being covered by the title are null and void, because made in violation of article 114 of the constitution.

Wisner's Curator v. Mayor and City Council of Monroe, 598.

CONSTITUTION AND CONSTITUTIONAL LAW—Continued.

20. The act of nineteenth April, 1871, which provides for the refunding of certain taxes improperly collected by the State, and on which the relators in this case rest their claim, is unconstitutional, as it clearly increases the State debt to an amount exceeding twenty-five millions. *State ex rel. Blackemore v. Graham*, 625.
21. Said act of the nineteenth April, 1871, is also in violation of article 111 of the State constitution, because, while creating a debt exceeding one hundred thousand dollars, it does not provide adequate ways and means for the payment of the current interest and of the principal when the same shall become due. *Ibid.*
22. No appropriation was made by law for drawing from the Treasury the large sum needed to reimburse the numerous claimants applying for this refunding of taxes under the law of 1871, which is, therefore, in violation of article 104 of the State constitution. *Ibid.*
23. The act No. 55, approved April 4, 1865, has never been held to be in violation of the State constitution. *Ibid.*
24. The statute of 1873 declaring that the amount of the contribution due by the stockholders of a bank shall be recoverable by summary process, as in case of a confession of judgment, is not in violation either of the State constitution or of the federal one.
Citizens' Bank of Louisiana v. Deynoodt, 628.
25. The statute provides a remedy for the more speedy enforcement of an obligation. It does not affect in any manner the obligation of the contract, nor is it retroactive; it provides only for the future. *Ibid.*

SEE LAWS No. 2—*State v. North Louisiana and Texas Railroad Company*, 65.

SEE CONTRACT No. 7—*Henderson v. Merchants' Mutual Insurance Company*, 343.

SEE CRIMINAL LAW No. 3—*State v. Kelley*, 321.

SEE COURTS No. 19 to 23—*Mechanics' and Traders' Bank v. Union Bank*, 387.

No. 24—*State v. New Orleans Gas Light Co.*, 398.

SEE NEW ORLEANS No. 1—*City of New Orleans v. Crescent Mutual Insurance Company*, 390.

SEE CORPORATION, Nos. 3, 4, 5—*State ex rel. Straight University v. Graham*, 440.

SEE LAWS AND STATUTES, No. 20—*Traders' and Factors' Insurance Co. v. City of New Orleans*, 454.

SEE TAXATION AND TAXES, No. 26, 27—*Whited v. Lewis*, 568.

CITATION.

1. Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being

CITATION—Continued.

shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice. *Holbrook v. Bronson*, 51.

2. Article 141 R. C. C. is to be construed as applying to the defendant, who is absent, or incapable of acting at the institution of the suit, and can not be cited in the usual way, but not to one who is legally and regularly a party to a suit and who voluntarily declines making a defense or temporarily leaves the place of the jurisdiction after being cited. The jurisdiction of the court can not thus be defeated. *Ibid.*

3. Where, on execution being issued in this case, Battle, Thorn & Co. were made garnishees by addressing the citation to said firm and serving the same on H. A. Battle, a member thereof, who answered the interrogatories under oath, but signed the name of the firm to the answers, instead of signing his own: Held—That the answers were sufficient and that the interrogatories could not be taken for confessed. He answered in the precise name in which he was cited. If the plaintiff wished him to sign his individual name to the sworn papers, the citation should have been addressed in that name. The answers were under oath, and could, if untrue, subject the garnishee, H. A. Battle, to a prosecution for perjury. This is the test. *Bell v. Short*, 312.

4. Where a suit was instituted on promissory notes, which were the obligations of an ordinary partnership, whose members were only bound jointly and had to be sued as joint obligors: Held—That a citation addressed to the firm, and served at the elected domicile of the ordinary partners, did not have the effect of bringing them into court. The judgment against them is therefore a nullity. The citations should have been addressed to each of the defendants. *Le Blanc v. Marsoudet*, 464.

SEE BANKRUPTCY, No. 1—*Kennedy v. Rust*, 554.

SEE APPEAL, No. 31—*State ex rel. Nixon v. Graham*, 433.

COMPENSATION.

1. Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation: Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it. *Adams v. Webster*, 117.

CURATOR AD HOC.

SEE SUCCESSION, No. 9—*Malone v. Casey*, 466.

SEE BANKRUPTCY, No. 1—*Kennedy v. Rust*, 554.

COMMUNITY.

1. Before the passage of the act of March 18, 1852, by which the community of acquets was extended, in favor of non resident married persons, to property in this State thereafter acquired, no such community existed. The property acquired after their residence here, alone fell into full partnership.

Succession of Waterer, 210.

2. Where the surviving husband, administrator of his wife's estate, brought with him to this State, as his personal property, more stock of every kind than he had at the decease of his wife: Held—That at the dissolution of the community he has the right to take in kind, if still existing, what he brought in marriage, and from the cattle remaining a number of head equal to that brought by him in marriage. *Ibid*

3. The remaining portion of the unpaid price of community property acquired during marriage, is a community debt, and this debt is secured by the vendor's privilege. Where this privilege existed anterior to the wife's tacit mortgage, which commenced only from the time her husband became her debtor, it can not of course be controlled by it.

Lemoine v. Powers, 514.

SEE MARRIAGE, No. 9—*Rusk v. Warren, 314.*

No. 10—*Millaudon v. Carson, 380.*

No. 15—*Desobry v. Schlater, 425.*

SEE SUCCESSION, No. 10—*Phelan vs. Ax, 379.*

SEE MORTGAGE, No. 11—*Seyburn v. Deyris, 483.*

CITIZENSHIP.

1. A citizen, in its largest sense, is any native born or naturalized person, who is entitled to full protection in the exercise and enjoyment of the so called private rights. By the laws of Louisiana native born free persons of color were in the full enjoyment of those rights in 1844. *Walsh v. Lallande, 188.*
2. By the treaty whereby Louisiana was acquired, the free colored inhabitants of Louisiana were admitted to a citizenship of the United States; therefore, a free colored person who was born in Louisiana, who had always lived there, and whose ancestors for two generations before him had been free and had lived in Louisiana, was a citizen of that State in 1860, at the epoch when the commissioner of the general land office, in an *ex parte* proceeding, canceled an entry made by said person under the pre-emption laws of 1841, on the thirty-first day of December, 1844, on the ground that said person, being a *free negro*, was not a citizen of the United States, although he had remained in possession of the land since the entry and had complied with all the requirements of the laws of the United States to entitle him to enter the land by pre-emption. *Ibid.*

COLORED PERSONS.

SEE CITIZENSHIP, No. 1—*Walsh v. Lallande*, 188.

SEE LAWS, No. 11—*Ibid.*

SEE CIVIL CODE, No. 8—*Fowler et al. v. Morgan*, 206.

CIVIL CODE.

1. Articles 121 and 131 of the Civil Code can not be construed to warrant the conclusion that the carrying on of any other business by a married woman than that of merchandise constitutes her a public merchant.

Moussier and Courcelle v. Gustine and Sauvinet, 36.

2. The words "separate trade" in the latter clause of article 131 of the Civil Code, declaring that the wife "is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband," refer clearly to the trade in merchandise and not to any other business or pursuit. *Ibid.*

3. The sixth section of the act of 1868, p. 194, concerning the transfer of bills of lading and the effects of that transfer, is only a legislative sanction given to the commercial law of universal application, by which it is held that a bill of lading, legally transferred, gives title to the property it represents. It does not clash with the statute of 1855 incorporated in the 3227th article of the Civil Code. The article 3227 does not give any privilege upon produce sold for cash. *Delgado & Co. v. Wilbur & Co.*, 82.

4. Article 1994, Civil Code, applies to acts made in fraud of creditors. *Fuentes v. Gaines*, 85.

5. Article 3542, Civil Code, refers to actions for the nullity of testaments when the instituted heir is in possession of property under the will, and is sued by the heirs at law to annul the will and to take from the instituted heir the property. It does not apply to a case in which the defendant in a chancery suit is obliged to come to the probate court to establish a part of his defense in consequence of the limited jurisdiction of the Circuit Court of the United States. *Ibid.*

6. It is essential to specify the day, month and year to give a date to a testament in the sense of article 1588 of the Civil Code. *Ibid.*

7. The facts required to be established by article 1655, Civil Code, for the probating of an olographic will must be proved by competent testimony, and can not be inferred by the court. *Ibid.*

8. Where it was contended that a donation *inter vivos*, made in 1858, by a white father to his two daughters, who were born of a black woman, then a slave, but who, with their mother, were entitled to claim their liberty at a future time (*statu liberæ*) was in violation of law, and therefore null and void: Held—That the rights of the parties must be decided under the provisions of article 193 of

CIVIL CODE—Continued.

the Code of 1825, and that under the circumstances of the case the donation must be sustained, whatever may be the moral view of the question. *Fowler et al. v. Morgan*, 206.

9. Where the defendant objected to the refusal of the judge *a quo* to charge the jury that actions for divorce are governed exclusively by section 1192, Revised Statutes: Held—That the judge committed no error, and the action is instituted under article 138 C. C., amended by act No. 76, statutes of 1870.

Michel v. Weil, 208.

CARRIERS.

1. The common carrier is bound faithfully to perform his duty, and he is responsible for the loss or damage resulting to the cargo confided to him, from neglect, imprudence, or want of skill, notwithstanding the stipulation to the contrary in the bill of lading. But in a case like this, where the shippers or their agents were present at the taking of the cotton on board the boat, and knew from the rain storm then prevailing, that the cotton must necessarily be exposed to the rain and mud, it would be inequitable to permit the owners or their consignees to recover from the boat or its owners, the amount of the damages occasioned by this exposure, when the agent of the shippers accepted the bill of lading, prepared by himself, containing the clause: "The boat not to be responsible for torn bagging, ropes or bands off, wet by rain, old damage or mud." *Newman & Co. v. Smoker, et al.*, 303.

2. Where it is contended that the defendants are not the first carrier or contractor, and that it is not proved that the error in the transmission occurred on defendants' line, on whose printed blanks there is express provision for non-liability for the default of other companies: Held—That, whether first carrier, or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary.

Lagrange v. Southwestern Telegraph Company, 383.

3. Defendants were engaged in the business of transmitting messages to and from various points in the country, and found it to their interest, if not a necessity, to effect such mutual arrangements with other companies, without any consultation with the parties who might use the telegraph. It was in their power to show that the message delivered by them to plaintiff was precisely the same one received by them from another line, and thus throw the responsibility upon the other company, in case it should be held to be a correct legal principle, that one of two or more connecting companies may thus be relieved from liability. *Ibid.*
4. The proposition that the defendants are liable, if at all, only in case the message is repeated as contained in the printed conditions,

CARRIERS—Continued.

can be invoked only against the sender of the message, if against any. The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such condition before delivery. *Ibid.*

CORPORATIONS.

1. Where it is clearly the purpose of the Legislature to give a company time within which they would have an opportunity to accept certain conditions imposed by that body, it can not be contended that official negligence in promulgating the law should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept; it would enable such official negligence to defeat the Legislator's will.

State v. North Louisiana and Texas Railroad Company, 65.

2. Where the defendant contended that the object of the original incorporators was to unite with the African Methodist Episcopal Church of the United States and be guided in the administration of its affairs by the doctrines and discipline of the general organization, and that, in accordance with said discipline, he was appointed by the Bishop of Louisiana pastor of St. James Chapel, and that he could not be discharged or dismissed from said position by the trustees or incorporators: Held—That under the charter of the corporation this right is expressly conferred upon the incorporators, and that, in the absence of any provision on the subject, they would have possessed the power, because it is one of the incidents of their ownership of the St. James Chapel.

African Methodist Episcopal Church v. Clark, 282.

3. The Straight University is not a public institution of learning in contemplation of article 140 of the State constitution.

State ex rel. Straight University v. Graham, 440.

4. A public institution of learning would be one which is controlled by the State through its agents, and in which the State would have a permanent interest and right of property, and which would depend upon the State for its existence. *Ibid.*

5. The Straight University was incorporated under the general statutes of the State as a private corporation. It is controlled by a board of trustees, who are only responsible for their management to certain private individuals. The State, through its officers or otherwise, exercises no control or direction over the university, nor has it any voice as to the manner in which it shall be conducted. It is not therefore a public institution of learning, and the constitutional objection to the appropriation made by the Legislature in its favor must prevail. *Ibid.*

SEE CONSTITUTION AND CONSTITUTIONAL LAW, No. 19—*Wiser's Curator v. Mayor and City Council of Monroe, 598.*

SEE ACTION, No. 16—*State v. New Orleans Gaslight Company, 393.*

COURTS.

1. Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto: Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary. *State v. Branch*, 115.
2. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government. *State v. Doherty*, 119.
3. Where the creditors of a succession opposed the final account of the administratrix of said succession, on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid: Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiæ*. *Succession of Meraday Neal*, 125.
4. The parish court charged with the duty of settling successions has nothing to do with the partition of property held in division, where the matter in dispute exceeds \$500. *Johnson v. Labatt*, 143.
5. The Supreme Court, where there is a doubt as to its jurisdiction, would maintain it in a case in which the whole people of the State are interested, and if this were necessary in order to protect them from what may be, and as in this case appears to be, a fictitious claim upon the common treasury. *State ex rel. Strauss v. Dubuclet*, 161.
6. Where parties claim title to lands acquired from the United States, after the general government has parted with its title, the courts will decide their rights under the law, without reference to the action of the officers of the land office. *Walsh v. Lallande*, 188.
7. This court can go behind the judgment of the court *a qua* to see when the obligations sued on arose between the parties. *Robert v. Coco*, 199.
8. Although this court has not the power to decide who are the members of the General Assembly, yet the judges thereof are bound

COURTS—Continued.

- to know what assemblage of men constitute the State Legislature for they are bound to know what are the laws of the State in order to adjudicate upon the rights of the litigants under the law.
State ex rel. Morgan v. Kennard, 23.
9. The court will take judicial cognizance of that irregularity which renders the issuing of a commission null and void, as having been done in contravention of positive law. *Kemp v. Ellis*, 231.
 10. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Collin v. Knoblock*, 231.
 11. No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board. The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact.
State ex rel. Bonner v. Lynch, 27.
 12. Courts of justice in this State sit to enforce civil obligations only and never attempt to exercise jurisdiction over those of a spiritual character. *African Methodist Episcopal Church v. Clark*, 222.
 13. The law creating the Superior District Court authorized the judge thereof to do, in the cases transferred to it from the Eighth District Court which was abolished, what the judge of the latter court have done. Whether the appointment of either of said judges by the Governor was unconstitutional and void can not be determined in such a collateral manner as on a motion to dismiss.
State v. Wharton et al, 1.
 14. Where the appointment of the judge was expressly authorized by the statute creating the court, as in the case of an original vacancy, whether this might or might not be sustained as constitutional, a proper proceeding, is a question not to be settled in this court, which the judge is manifestly an officer *de facto* and his acts must be recognized just as those of an officer *de jure* upon a regular trial, he is disclosed not to be an officer.
 15. Where the claims of individuals come in conflict, it is the province of the judiciary to decide what they rightfully are under the constitution and the laws, rather than to decide whether the constitution and laws have been rightfully or wisely made.
 16. Where the property in controversy is situated in Louisiana, whose limits the owners thereof reside, their rights can be barred by the laws of this State, which are binding on the

DAMAGES—Continued.

4. When a driver attempts to pass another on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself.

Avegno v. Hart, 235.

5. Where it was objected to the claim for damages that the arrest of plaintiff on the ground that he was departing permanently from the State without leaving therein sufficient property to satisfy the demand against him, was not done with malice, but was the exercise of a mere legal right prosecuted in the form authorized by law, and, therefore, that the defendant could not be responsible in damages: Held—That this objection is not valid.

Rogay v. Juilliard, 305.

6. If it be conceded that a contract was violated willfully, or through carelessness, still the measure of damages would be the injury inflicted upon the plaintiff, where there is no *penal* clause in the contract.

Bohn v. Oleaver, 419.

7. Damages arising from the presumable profits of a speculation that was never made, are too uncertain for a court of justice to award.

Ibid.

SEE EVIDENCE No. 30—*Gordy v. Veazie*, 518.

SEE PRESCRIPTION Nos. 13, 14—*Lizardi v. New Orleans Canal and Banking Company*, 414.

DEPOSIT.

1. There is no reason why a deposit to the credit of an overdrawn account should not be fully as legal and unsuspecting as one on an account already credited with a balance. The discovery of an overdraft is the strongest possible incentive to an early deposit to make the account good. *Orescent City Bank v. Hernandez*, 43.
2. Where the defendant was sued for two mortgage notes left with him on deposit, and required to restore them or pay the full amount thereof: Held—That defendant disclaiming any ownership of said notes and having no personal interest in them, has no defense to set up for himself, and has no right to plead one for a third party and ask the court to pass upon a question that would not be binding if decided for or against that person. *Ducros v. Gottschalk*, 233.
3. The only privilege granted by law to the depositor is on the price of the sale of the thing deposited by him.

Lanoue v. Dumartrait, 478.

4. The law does not give a general privilege to the depositor, but simply on a particular movable. *Ibid.*
5. Where the funds deposited have been appropriated by the deposi-

COURTS—Continued.

act complained of is not only not alleged to be interfering with the exercise of any person's rights, but not even in operation.

State v. New Orleans Gaslight Company, 388.

25. It is not for this court, or any other, to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to land. But if the United States, at the moment of the adjudication, had no title to the land in question, this action of the officers of the Land Department gave the plaintiff none; and the question whether the United States had any title at the time of the adjudication, is clearly a question for the courts of justice, and not for the officers of the Land Department, to decide. The plea of *res judicata* in this case is overruled. *Copley v. Dinkgrave*, 577.

SEE NEW TRIAL, No. 3—*State v. Socha*, 417.

SEE PRACTICE, Nos. 23, 24—*State v. Allemand*, 525.

SEE JURISDICTION, Nos. 9, 10—*Lay v. Succession of O'Neil*, 608.

CODE OF PRACTICE.

1. The provisions of the Code of Practice relating to oyer do not apply to a document filed in a cause in court.

Cincinnati Insurance Company v. Harrison, 1.

2. Article 613 of the Code of Practice, concerning prescription, clearly refers to a *judgment in a contested suit*, but which has been obtained through fraud, or because the defendant had lost the receipt given by plaintiff. *Fuentes v. Gaines*, 85.

DONATION.

1. Where it was contended that a donation *inter vivos*, made in 1858, by a white father to his two daughters who were born of a black woman, then a slave, but who, with their mother, were entitled to claim their liberty at a future time (*statu liberæ*) was in violation of law and therefore null and void: Held—That the rights of the parties must be decided under the provisions of article 193 of the Code of 1825, and that under the circumstances of the case, the donation must be sustained, whatever may be the moral view of the question. *Fowler et al. v. Morgan*, 206.

DIVORCE.

SEE CIVIL CODE No. 9—*Michel v. Weil*, 208.

DAMAGES.

1. A reparation by recantation can only be considered in estimating the amount of damages.

Perret v. New Orleans Times Newspaper, 170.

2. In an action of libel it is not necessary to prove any special damage to recover. *Ibid.*

3. Damages for a suit, unless malice is shown, can not be recovered. *Coco v. Hardie*, 230.

DAMAGES—Continued.

4. When a driver attempts to pass another on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself.

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4. The law does not give a general privilege to the depositor, but simply on a particular movable. *Ibid.*

5. Where the funds deposited have been appropriated by the deposi-

DEPOSIT—Continued.

tary, and of course can not be identified, and the amount thereof or therefor is not due to the depositary by another, there is nothing subjected to the privilege. *Ibid.*

6. There is no law known to the court that allows the general privilege claimed by the plaintiff as depositor, on the property of the depositary's succession. Said succession, being insolvent, other creditors would be affected, and it seems that, to avail plaintiff's claim, if it exist, registry is necessary, but has not been made.

Ibid.

7. The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property.

Levy v. Pike, 630.

8. Where the deposit was a gratuitous one, and where the abstraction of the thing deposited seems to have been one of those bold and adroit acts which are carried out successfully in defiance of ordinary prudence and diligence, and the possibility of which is seen only after its accomplishment, the depositary is not liable, as he would be if the loss arose from gross or inexcusable negligence on his part.

Ibid.

SEE COMPENSATION No. 1—*Adams v. Webster*, 117.

DOMICILE.

1. Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice.

Holbrook v. Bronson, 51.

2. It can not be contended on her behalf that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent, or had gone out of the parish, it was necessary to appoint an attorney upon whom service of the notice of judgment should have been made.

Ibid.

3. A joint obligor can be cited at the domicile of his co-obligor.

Adams & Co. v. Scott et al., 523.

ELECTION LAWS.

1. The law of the twentieth November, 1872, relative to elections, did not repeal the election law of 1870, which created the Board of Returning Officers, and did not destroy their office. It was merely a revision and re-enactment of the former with emendations.

State v. Wharton, 2.

2. The provisions of the act of 1872 were intended to apply only to elections held under it after its passage, and by no correct or admissible rule of construction can its repealing clause be held to defeat an election had under the previous law, when the results thereof were not yet ascertained.

Ibid.

ELECTION LAWS—Continued.

3. The fifty-fourth section of the act of 1870, No. 100, relating to elections, repeals section 1130 of the Revised Statutes, being section No. 53 of the act of March 15, 1855, prescribing the mode of contesting elections, and the party commissioned under the provisions of said act of 1870 is *prima facie* entitled to the office he claims. *Hughes v. Pipkin*, 127.

4. Under sections 2595, 2605, R. S., relative to contested elections and the whole tenor of the intrusion law, defendant in the court below, and relator here on application for a mandamus, could waive the delay for answering and have a day designated for trial without waiting until issue was joined by said answer. Whether the nature of the defense developed in the answer when filed would have authorized a continuance on behalf of the plaintiff is not a question in this case. If the plaintiff is debarred from asking for a jury to be summoned and for a continuance to that effect, it is by his own fault. There was no legal and valid reason for continuing the case as was done, and the plaintiff had no right to a trial by jury as was accorded to him, inasmuch as he did not ask for one in his petition and procured the discharge of a jury that was present, to whose sufficiency and competency as jurors no objection was made, and by whom the defendant in the court below and relator here expressed a willingness to have his case tried immediately. Plaintiff's subsequent application for a jury was obviously for delay. The law makes this class of cases summary in form of proceeding. For these reasons the mandamus prayed for is made peremptory, and the judge *a quo* is ordered to set down relator's case for trial by preference over all other cases and without a jury on the second day of the regular term of his court, April 8, 1873, and to have notice thereof immediately given to the parties.

State ex rel. Pintado v. Judge Fifteenth Judicial District, 149.

5. The defendant having been returned by the legal returning board of the State as elected judge of the Fourth District Court of New Orleans, and upon that return the Acting Governor having issued a commission to him according to law, it can not be said that one holding an office under such a commission has intruded into, or unlawfully holds the office. *State ex rel. Bonner v. Lynch*, 267.

6. No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board. The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact. *Ibid.*

SEE OFFICES AND OFFICERS, COURTS, GOVERNOR.

EMANCIPATION.

SEE MARRIAGE, Nos. 17, 18—*Pierre v. Fontenette*, 617.

EVIDENCE.

1. The loss of an appeal bond being established, secondary evidence, either written or oral, may be introduced to procure the alleged signature of the defendant to the bond as surety.

Cincinnati Insurance Company v. Harrison et al., 1.

2. Servitudes, when an act of sale is silent on the subject can only be shown by proof of the use or existence thereof for a period sufficient to establish title, and this may be proved by parol. All agreements in relation to such use may also be proved by parol, unless it is shown that they were reduced to writing.

Macheca v. Avegno, 55.

3. The evidence in this case shows that the alleged servitudes were subject to the will of the owner of the property on which they were exercised, and that the owner or owners of the other property in whose behalf said servitudes were claimed to be established never acquired any legal title thereto.

Ibid.

4. Where an objection was made that there was in the record no authentic evidence of the costs of protests and copy of an act of mortgage: Held—That these costs were a part of those incident to the proceeding, and that, if authentic evidence of the amount thereof was necessary, the rule *de minimis* was applicable.

Durac v. Ferrari, 80.

5. The objection to the irrelevancy of evidence is a very weak one when the case is tried without the intervention of a jury. In such a case, the only question, in effect, is upon the sufficiency or weight of the evidence. If the evidence found in the record is irrelevant, it will be ignored by the court.

Fuentes v. Gaines, 85.

6. Where a will, when last seen was in the possession of the testator, and it could not be found at his death, the presumption of the law in such a case is, that the testator destroyed it *animo cancellandi*, and the *onus* of rebutting this presumption is cast upon those seeking to establish the will. The opinion or suspicions of a witness can not overcome the presumption raised that the testator himself destroyed the will.

Ibid.

7. The contents of a lost will can not be proved by witnesses who derived their knowledge from the verbal declarations of the testator. It would practically authorize the making of a verbal testament, and a lost testament could thus be proved by evidence which would be incompetent to prove the will if produced in court.

Ibid.

8. It is necessary to prove that a lost olographic will contains all the essentials prescribed by law before it can be admitted to probate, to wit: That it was wholly written, dated and signed by the

EVIDENCE—Continued.

testator, and the witnesses must state the facts which are necessary to enable the court to determine whether or not the will is valid. *Ibid.*

9. The facts required to be established by article 1655 Civil Code for the probating of an olographic will must be proved by competent testimony, and can not be inferred by the court. *Ibid.*
10. Where an *ex parte* statement of account, annexed to the petition, was allowed to be received in evidence, and the books of the partnership, which had been kept by the plaintiff himself and offered by the defendant, were excluded: Held—That the court *a qua* erred. *Job v. Huer, 279.*
11. Where in a suit to erase the mortgage of a third party, said party alleged that the mortgaged property had never been individually owned by the debtor of the plaintiffs, and that, even if it had been the property of said debtor, which was expressly denied, the mortgage was binding and operative, and that no valid reason existed in law to have it canceled: Held—That the two pleas were not contradictory, and that the judge *a quo* erred in ruling defendant to elect between them, because it was competent for the party to prove that the property seized not belonging to the debtor of the plaintiffs, they had no right or interest to inquire into the validity of the mortgage resting on it; and because it was also competent for said third party to establish at the same time that the mortgage in his favor was valid.
Northern Bank of Kentucky v. Police Jury of Pointe Coupee, 185.
12. The statements under oath, in a judicial proceeding, made as a party accused and not as a witness, are not to be held as voluntary and therefore are not admissible as evidence on the trial of said accused party. Where it was objected to the admission as evidence of a declaration in writing purporting to be a voluntary confession of the accused, on the ground that such a declaration was not voluntary, because it appeared on the trial of the case that it was doubtful whether or not inducements by the Superintendent of the Metropolitan Police had not been offered to the accused to make said declaration, and because under such circumstances, the accused was entitled to the benefit of the doubt; Held—That the Court below erred in overruling the objection.
State v. Garvey et al., 191.
13. Where the plaintiff excepted to the evidence of the defendant, who testified that he never received the money declared in the marriage contract to be the property of the mother of the plaintiff, nor did ever receive any property from her, or for her account, nor ever made the donation *propter nuptias* mentioned in the marriage contract: Held—That the objection should have been sustained,

EVIDENCE—Continued.

because the notarial act could not be contradicted by parol testimony. *Edwards v. Edwards*, 200.

14. Where evidence was admitted because it was confirmatory and explanatory of the title filed in answer to the prayer for over, and did not constitute a new and independent title: Held—That the bill of exceptions thereto was not well taken.

Irwin v. Peterson, 300.

15. Where the plaintiff, claiming for the use of A, judicially admitted that the insurance on a house was effected by him on behalf and for the benefit of said A: Held—That the court *a qua* erred in not permitting defendant to show that A had set the house on fire, and further erred, under the circumstances of the case, in not allowing defendant to prove plaintiff's declaration, after the fire, that the premises were not his and that he had never possessed any insurable interest therein, notwithstanding his title had been received in evidence.

McCarty v. Louisiana Mutual Insurance Co. of New Orleans, 354.

16. Where a bill of exceptions was taken to the ruling of the judge *a quo*, refusing to permit evidence to be offered, on the trial of a motion in arrest of judgment, to prove that one of the jurors was an unnaturalized alien: Held—That said ruling was correct. Such motions must be based on errors patent on the face of the record. Besides, the juror having been accepted, the defendant could not, after conviction, complain of the want of qualification in the juror.

State v. Hardin, 369.

17. The court below also erred in compelling the defendant, who had pleaded the general issue, to plead payment before permitting him to introduce proof that he had settled in full with the plaintiff. Said plaintiff having alleged a final settlement, it was competent for the defendant to prove what that settlement was.

Job v. Huer, 279.

18. Where Effingham Lawrence mortgaged half of a plantation to secure some promissory notes, said mortgage being in favor of Cassanave, or any other future holder of said notes, and the mortgaged property was subsequently transferred to Packard et als., who assumed to pay the said notes as part of the price, and the notes fell into the hands of Lee, who sued out an order of seizure and sale against the property, which order was enjoined by Packard et als.: Held—That on the trial of the injunction, the court *a qua* did not err, in permitting Lee to introduce the authentic evidence upon which the order of seizure and sale was granted; and also, that the court did not err, in refusing to allow Packard et als. to introduce in evidence a letter of Effingham Lawrence, the mortgageor, on the ground of irrelevancy.

Lee v. Packard et als., 397.

EVIDENCE—Continued.

19. Where, on the admission of the tutrix of a minor child, judgment was rendered declaring the sale of a certain piece of property to the minor's father, now deceased, to be simulated, and reconveying the title to the plaintiff, and condemning him to refund whatever taxes the widow paid, and to pay costs, reserving the rights of the minor, whatever they may be: Held—That, although it is true the tutrix could make no admission which could bind the minor, yet that, as the law allows such suits and the proof of simulation by a *particular kind* of evidence, which, it seems, might have been, but was not adduced by plaintiff, he should be allowed an opportunity to furnish it, and not to rest under a cloud upon his title, which, it is probable from the facts in the record, could be removed, wherefore the portion of the judgment which "reserves the rights of the minor, whatever they may be," is reversed, and the case remanded for the purpose of allowing the plaintiff to introduce *legal* evidence as against said minor's rights, if any there be, to the property in question.

Vinson v. Succession of Tompkins, 437.

20. Where the defendant objected to the ruling of the court receiving in evidence a note and mortgage, on the ground that they were not stamped at the time of their execution, as required by law, and where it appeared that neither the notary before whom the act of mortgage was passed, nor the parties, had any stamps when the act was passed, and mention of the fact was made in the act, but that one of the plaintiffs went immediately to Opelousas, purchased the necessary stamps from the recorder, who placed them on the act and canceled them in the presence and at the request of the party: Held—That this was sufficient.

Pavy & Co. v. Bertinot, 469.

21. Where at the time a mortgage-bearing note was given, no stamps were affixed to it, but before the note was offered in evidence it had been stamped by the district United States collector of internal revenue, who collected the interest required by law and remitted the penalty, this was all the law required of the parties. *Ibid.*
22. Where in defense against plaintiffs' claim, an agreement with said plaintiffs in full satisfaction of the amount due them, was relied on by defendants on account of their tutorship, and a bill of exception was taken to its introduction in evidence, on the ground that an agreement of this nature could not be established by parol evidence: Held—That when all the parties are able to contract, if they did make a contract, there is no reason why it may not be proved by competent proof.

Harris v. Keigler, 471.

23. Where the defense to a promissory note was the prescription of five years, and several credits being indorsed on the note, oral

EVIDENCE—Continued.

- evidence was offered to prove that payments were made by the deceased at the dates indicated by the indorsements, the exception to the evidence was well taken. The plea should have been maintained. *Guillory v. Dejean*, 481.
24. The language: "I have no objection to the payment of the within note," is unambiguous, and the testimony to establish something else than is imported by the language, was properly excluded. *Millard v. Smith*, 491.
25. Parol evidence is inadmissible to prove an acknowledgment or promise of a deceased person to pay a debt, in order to interrupt prescription. *Ibid.*
26. Where promissory notes were offered in evidence, properly stamped, with the approval of the United States officer whose duty it was to stamp such notes, they were admissible, and it formed no part of the duties of the State court to inquire whether or not the United States officer had done his duty. It was sufficient to show that the notes were stamped with the approval of the said officer. *Levy et als. v. Loeb*, 496.
27. Where the plaintiff had been allowed to explain by parol the circumstances attending the seizure of which he complains, it was competent for the defendant to produce rebutting evidence in relation to the facts connected with the seizure, which did not tend to contradict, vary, or alter his written return on the order. *Mouton v. Broussard*, 497.
28. Where the act of sale, which was offered in evidence, contained the recital of a power of attorney, and the power was not denied, the act was sufficient to prove what it related. *Gant v. Eaton et al.*, 507.
29. Where plaintiff excepted to the ruling of the court *a qua* which permitted the defendant to establish by witnesses the value of certain items of the work sued on by plaintiff, on the ground that plaintiff having sued for the value of the work as a whole, without setting any specific value on its separate items, and the defendant having substantially accepted in his answer the issue presented, the testimony offered was not confined to said issue: Held—That the exception was not well founded. The sum total of the bill sued on being composed of various items, it was competent for the defendant to show by witnesses the separate value of each of the items which made up the aggregate work in order that the correctness of the general charge might be properly arrived at. *Gordy v. Veasey*, 518.
30. A party for whom work has been done on a certain building is not barred from offering any proof of damage on account of the unskillfulness of the work, because of his having taken possession of the building. *Ibid.*

EVIDENCE—Continued.

31. The testimony of a witness to establish that plaintiff had, before the instituting of his suit, presented to the defendant a bill in which he charged less for his work than the amount for which he has sued, was properly received. *Ibid.*
 32. It is not proving title to lands by parol, when the sole object of the testimony is to prove where wood was cut, whether on the plaintiff's or defendant's lands, and such testimony should have been received in this case. *Grevenberg v. Borel*, 530.
 33. Upon the question of the nature of the evidence necessary to prove a planting partnership, presented in defendant's bill of exceptions in this suit, the court knows of no law which requires the proof to be in writing. *Battle v. Jenkins*, 593.
 34. Written acts which, by intendment of law, are clothed with solemnities in their execution, in order that they may become enduring records of past events, more surely to be relied upon than the frail memory of men, should not hastily be disregarded even upon the positive evidence of a single witness of their falsity, when such evidence is isolated, unsupported by facts *aliunde*, and given by the witness in his own behalf under strong influences of self-interest. *Puckett v. Law*, 595.
 35. The assignment of error, upon which a reversal of the judgment is asked, that parol evidence was introduced to prove a promise to pay eight per cent. interest, is a ground to amend the judgment. *Gerspach & Herring v. Mullen*, 599.
 36. The evidence of a documentary character offered by the Auditor to show that, at the time the contract relied on by plaintiff was entered into, the debt of the State was in excess of twenty-five millions of dollars, was improperly rejected. *State ex rel. Livingston v. Graham*, 629.
 37. Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation: Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it. *Adams v. Webster*, 117.
- SEE CONTRACT, No. 12—*Lalanne v. Goodbee*, 481.
- SEE JUDGMENT, No. 29—*Grevenberg v. Borel*, 530.
- SEE EXECUTOR AND ADMINISTRATOR, Nos. 11, 12—*Succession of Leontine Guilbeau*, 474.
- SEE LAWS, No. 3—*State ex rel. Richardson v. Graham*, 73.

ESTOPPEL.

SEE SUCCESSION, No. 1—*Successions of Dunford and Remi*, 56.

SEE PLEADINGS, No. 2—*Sampson Brothers v. Townsend*, 78.

SEE HOMESTEAD, No. 1—*Le Blanc v. St. Germain*, 289.

EXECUTOR AND ADMINISTRATOR.

1. An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the terms of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents which do not come within the purview of their powers, and which are therefore not regarded as binding on their principals. Therefore the defendants' plea in this case that they are not bound as sureties on the notes sued upon, for the reason that the plaintiff gave an extension of time to the principals without their knowledge and consent, is not well founded.

Landry v. Delas et al., 181.

2. By the express terms of article 1671 of the Revised Code, the heirs can at any time take the seisin from the testamentary executor on offering him a sum sufficient to pay the movable legacies, and on complying with the requirements of article 1012.

Sevier v. Sargent, 220.

3. Whether the executor be discharged or not, the remedy of a creditor is not against him, but against the heirs who have been put in possession of the property of which they have become the owners and who are bound to pay the debts of the deceased, each his virile share.

Ibid.

4. A rule against an executor or a succession can not be taken after the succession has been closed and the executor has been discharged, nor can an order to sell succession property be granted after the heirs have been in possession subsequently to a partition among themselves.

Sevier v. Succession of Gordon, 231.

5. A suit by the executor of a succession to compel the heirs of said succession who have been put in possession thereof, to pay the commission claimed by said executor, is properly brought before another court than the Second District Court, which has only probate jurisdiction.

Hale v. Salter, 320.

6. The law gives to the executor a compensation for his services, and the heirs can not deprive him of it by causing themselves to be put in possession after the executor has accepted the trust and qualified.

Ibid.

7. Where it was contended by the heirs that the executor's claim for his commission had lapsed, because it was not demanded when the succession was turned over to them: Held—That if he did renounce his claim, his renunciation should have been express. It can not be inferred.

Ibid.

EXECUTOR AND ADMINISTRATOR—Continued.

8. Where the heirs contended that they could not be called upon to pay plaintiff's claim, because the law provides that the commissions of executors are based on an inventory, and no inventory was taken in this case, wherefore there are no means by which the amount due to the plaintiff can be ascertained: Held—That the heirs can not by their own act prevent the executors from taking an inventory, and then refuse to pay them their commission. The executor should be allowed to show the value of the succession *aliunde*. *Ibid.*
9. Where letters testamentary have been issued by a court of competent jurisdiction to two executors, on their complying with the requisites of the law, and one of them takes the oath well and faithfully to perform his duties, as executor, and the other does not, the one who has not taken the oath is presumed to have renounced the trust, and the one who has qualified is entitled to the entire commission. *Ibid.*
10. Where there was no necessity for a citation, but where the plaintiff and opponent had been formally summoned by the defendant, to oppose his account as executor of a succession, if he thought proper, and to present his opposition within ten days; Held—That said defendant could not invoke judicial action in the matter to the prejudice of plaintiff and opponent before the specified day had expired. Hence, the order of homologation having been rendered after three days delay only, was null, and no action of nullity is necessary to set it aside. *Succession of Hogan, 331.*
11. Where the administrator of a succession, within six days after his appointment, gave bond and entered upon the discharge of the duties of his office, and so continued to the knowledge of the creditors and heirs until the expiration of nearly two years, when, upon the *ex parte* application of some of the heirs and the husband of the deceased, his appointment was canceled on the ground "that he failed and neglected to give the security or give the mortgage required by law, and that more than ten days had elapsed since his appointment," and one of the said heirs prayed to be appointed administrator—to which said administrator filed an opposition and prayed for the annulling of the order canceling his appointment: Held—That the exceptions to the introduction of evidence to prove the inability of the administrator at the date of the bond, to furnish sureties in the parish of the succession, and to establish the sufficiency of the sureties on the said bond, could not be sustained. *Succession of Guilbeau, 474.*
12. The administrator having already been removed by an *ex parte* proceeding, and being, by the pleadings thus forced upon him, put in the position of the attacking instead of the assailed party,

EXECUTOR AND ADMINISTRATOR—Continued.

- and to avoid multiplicity of suits, if for no other reason, the court would be inclined to permit him to do what he might have the right to do in a direct action for his removal, based on the ground of the alleged irregularity and insufficiency of his bond. Besides, the object of the evidence offered and excepted to was to enable the judge *a quo* to execute the law authorizing him to pass on the sufficiency of the security of persons residing out of the parish, and to acquire such proof as he might deem necessary. *Ibid.*
13. Where the administrator had been appointed, had qualified, furnished a bond, and caused inventories to be made, if there is any informality or insufficiency in such acts or proceedings which would authorize a removal, this could be accomplished only in a direct action by petition and citation. The bond, as furnished in the first instance, was not a nullity. There was, at least, a *prima facie* compliance with the requirements of the law, which should have been regularly attacked if deemed insufficient. *Ibid.*
 14. An acknowledgment and promise to pay by an administrator is not an acknowledgment and promise by the debtor himself or by his specially authorized agent, even if the draft given by the administrator for the payment of the judgment, with the right of subrogation to the drawee, can be regarded as an acknowledgment and promise to pay the judgment. It is not considered that the draft amounts to such a promise. *Succession of Hardy, 489.*
 15. The language, "I have no objection to the payment of the within note," is unambiguous, and the testimony to establish something else than is imported by the language was properly excluded. Besides, such an indorsement, as above mentioned, on the note of a deceased person, was not an engagement on the part of the administratrix of the estate to pay the debt. This is immaterial, however, as the note was prescribed at the time of said indorsement. *Millard v. Smith, 491.*
 16. The account rendered to the heir being a copy of the one previously homologated, contradictorily with the creditors, is *prima facie* correct. *Succession of Caballero, 646.*
 17. If the items thereof were exorbitant and undue, the opponents should have administered proof to overcome the presumption of correctness existing in favor of the accountant by reason of the judgment of homologation. This has not been done. Illegal charges, however, apparent on the face of the record, can be corrected. *Ibid.*
 18. An executor can not keep in his hands the funds which, according to law, he was bound to deposit in bank, on the plea of retaining only the amount of a legacy due to him, when the testamentary disposition in his favor, by the express terms of the will, was to

EXECUTOR AND ADMINISTRATOR—Continued.

be discharged out of a particular fund in Havana, Island of Cuba, of which he had not the seizin. The funds in controversy in this case were not derived from that source, and ought not to have been retained and used by the executor. *Ibid.*

- .19. The sureties of the executor not having been cited and not appearing in this suit, the judgment rendered against them was annulled on rehearing. *Ibid.*

SEE PRACTICE, No. 25—*Succession of Romero*, 534.

SEE TUTOR AND TUTORSHIP AND SUCCESSION.

EXECUTION AND EXECUTORY PROCESS.

1. In executing the process of court the sheriff had no right to incur costs for advertising in other papers than the official journal.

City of Baltimore v. Parlange, 335.

- .2. To complete the seizure in this case, the sheriff of the parish of Orleans was not bound to take corporeal possession of the property and appoint a keeper. The seizure was completed by registering the notice. *Ibid.*

- .3. The charge for appraisers' fee was properly rejected, because prohibited by article 671, C. P. The item of costs for plan and survey was also unauthorized. The charges for city and State taxes on the property were correctly made. It was the duty of the sheriff to pay them out of the proceeds of the property sold. *Ibid.*

SEE SHERIFF AND SEIZURE.

EXEMPTION FROM TAXATION.

SEE TAXATION, Nos. 26 and 27—*Whited v. Lewis*, 568.

EXEMPT FROM SEIZURE.

1. The property exempted from seizure and sale by section 1691, Revised Statutes of 1870, is predial and not urban. The general rule is, that the property of the debtor is the common pledge of his creditors. Exemption laws create exceptions to this general rule which are not to be extended beyond the express terms of the lawgiver. *Crilly v. Sheriff et al.*, 219.

FACTORS AND COMMISSION MERCHANTS.

1. A factor can not secure his individual creditor by pledging the planter's cotton which has been confided to him for sale. That power is not conferred by act No. 150 of the acts of 1868, entitled "An Act to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton presses, wharfingers and others." There is nothing in the statute showing any intention of the legislator to enlarge the powers of factors, or to give them the right to pledge the property confided to them for sale. *Young v. Scott & Cage*, 313.

GOVERNOR.

1. The Governor is not vested with the extraordinary discretion to determine who are the returning officers under the law.

State v. Wharton et al., 2.

2. The Governor is not vested by the act of 1872 with authority to appoint the officers of the returning board of election. *Ibid.*

3. The Governor was wholly without legal right to suspend or remove the Secretary of State *de facto*, recognized as such by a court of competent jurisdiction and by himself. *Ibid.*

4. The extrusion and exclusion of Bovee, the Secretary of State *de jure*, from said office by the Governor, did not and could not vest in the Governor the control of the office with the right to put in and put out the occupants thereof at his pleasure. There was no vacancy in the office of the Secretary of State, Bovee, the incumbent *de jure*, who was only excluded or suspended, and whose office was in the meanwhile filled by Herron, the Secretary of State *de facto*; and yet Wharton was appointed Secretary of State without reference to any removal or vacancy. The commission is without effect. *Ibid.*

5. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government.

State v. Doherty, 119.

6. It does not follow that, because the State has appealed through the Attorney General, she can not appeal through the Governor as well. He clearly has the right to appeal on behalf of the State, and this right can not be taken away from him, simply because another officer of the government has been before him, when he takes the appeal within the delays required by law. In this case the appeal was taken in ample time.

State ex rel. Strauss v. Dubuclet, 161.

7. It is not legally correct to say that no person is authorized to appeal on behalf of the State, except in cases where the Attorney General is unable or unwilling to act. The prohibition is limited to the employment of counsel other than the Attorney General by the Treasurer and Auditor, and does not exclude the Governor from doing so. *Ibid.*

8. The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason, therefore, to maintain that article 61 of that instrument refers only to the regular or annual sessions of the General Assembly in relation to executive appointments. *State ex rel. Morgan v. Kennard*, 238.

9. The Warmoth commissions that were issued before the general election returns were reported and promulgated by the returning officers of the State, are null and void. *Kemp v. Ellis*, 253.

GOVERNOR—Continued.

10. A commission issued by the Governor must be recognized as having legal force, when it bears *prima facie* evidence of genuineness and validity, and nothing to the contrary is shown. *Ibid.*
11. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Collin v. Knoblock*, 563.
12. For certain reasons expressed in the statute of 1871, p. 126 of acts of 1871, prescribing the duties of tax collectors, the Governor is authorized to remove a tax collector from office. The relator in this case having a commission bearing date a month later than the commission of Yoist, the presumption is that the Governor had cause for removal of the latter, which was effected by the appointment of Dayries. *State ex rel. Dayries v. Yoist*, 396.
13. The Attorney General having neglected or declined to take an appeal, after having intervened and gone into the defense of the case, adopting the defense made by the Auditor and superadjoining grave objections to the relator's claim, it became the duty of the Governor, under this condition of affairs, to take, in the interest of the State, the appeal which he did.

State ex rel. Livingston v. Graham, 629.

GOVERNMENT OF THE UNITED STATES, ITS WAR POWERS.

SEE COURTS, No. 19 to 23—*Mechanics and Traders' Bank v. Union Bank*, 387.

GARNISHEE.

1. The garnishee is a stakeholder, and on his answers the judgment should be for or against him. He has no interest in the contest between the creditor and debtor. But where the object of a motion to strike out part of the answers of the garnishee and of the traverse of the answers, is to attack the settlement made between the garnishee and the judgment debtor, the garnishee must be permitted to explain that he holds the thing attempted to be seized, by virtue of a title acquired by a settlement between himself and his debtor. The plaintiff can not be allowed to change his garnishment process into a revocatory action. His remedy is by a direct action. The garnishee can not be divested of his possession and alleged ownership through any process which would deprive him of explanations and defenses allowable in a direct action by the judgment debtor to recover his property.

Hodges v. Graham, Hodges & Co., 365.

HOMESTEAD.

1. The benefit of the homestead act can be pleaded in bar of the foreclosure of a conventional mortgage given on the homestead sub-

HOMESTEAD—Continued.

sequent to the enactment of the law. It can not be rightfully contended that, in consenting to the mortgage, the plaintiff in injunction waived the benefit of this exemption, and that it amounted to a renunciation of the right. No one is presumed to waive a legal right, and every contract is supposed to be made in reference to the law that governs it. In this case there was no express renunciation or waiver. *Leblanc v. St. Germain*, 289.

2. Where a widow, in necessitous circumstances, opposes the administrator's account of a deceased husband's estate, claiming that she is entitled to one thousand dollars under the homestead act, and it appears that the children own more than one thousand dollars in their own right, the widow does not come within the provisions of the statute. *Succession of Melançon*, 535.

SEE LAWS, No. 9—*Mills v. Sheriff of East Feliciana et al.*, 142.

No. 13—*Robert v. Coco*, 199.

HEIRS.

SEE SUCCESSION, EXECUTOR AND ADMINISTRATOR.

HUSBAND AND WIFE.

SEE MARRIAGE.

SEE COMMUNITY.

INSURANCE.

1. A river policy of insurance, No. 208, was executed in favor of A on the first of February, 1867, according to all the forms prescribed by the charter and by-laws of the company. The insurance was "on account of whom it may concern, on such property lost or not lost, and in such sums, to and from such ports or places, and by such good and seaworthy steamboats or other river craft as may be approved by the company and entered in the book attached to the policy; it being expressly understood and agreed that no risk under this insurance is or shall be binding unless so approved and entered." Subsequently, on the fourth of same month, A, under the open river policy No. 208, made a special application, which was accepted, to have all the merchandise shipped to him on the Ohio and Mississippi rivers and their navigable tributaries, covered without being entered in the book attached to the policy, the risk on any one boat being limited to \$5000, and he binding himself to report the shipment as soon as notice thereof was received by bill of lading or otherwise. On the ninth of April, A had an entry made in the book attached to his policy by which merchandise shipped to him from Montgomery on the Alabama river was covered. The merchandise had been burned on the seventh of same month, but A had no knowledge of the fact at the time of the entry: Held—That the entry was regularly made and within the terms of the open policy; that said policy author-

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INSURANCE—Continued.

ized the risk from the port of Montgomery, on the Alabama river; and that the special application was an additional agreement containing certain stipulations, none of which modified the open policy so as to limit the risks to the Ohio and Mississippi rivers and their navigable tributaries.

Marx v. National Marine Fire and Insurance Company, 39.

2. Where the stipulation is that the property to be insured shall be covered, lost or not lost, and no fraud has been established against the insured, the contract of insurance becomes operative and covers the property whether lost or not lost at the time of the entry.

Ibid.

3. Where the suit was on promissory notes given as premiums on policies of insurance to a company, and the plea in defense a want of consideration, on the ground that the policies, if issued, were not in accordance with the instructions from the party intending to be insured to the agents of said company, and did not cover the risks stipulated in the application; and where the issue was that the policies never were issued and delivered to the applicant, the proofs, which should be in the possession of the plaintiff, not being found in the record, there will be a judgment of nonsuit.

Eureka Insurance Company v. Tobin et al., 121.

4. Where an insurance company notified the insured that a forfeiture would not be claimed for non-payment of assessments, till thirty days after the publication of a notice of the call, for eight consecutive days, the said company should have made the publication and given the delay, because the insured had the right to expect it, and is presumed to have acted upon it.

Fitzpatrick v. Mutual Insurance and Benevolent Life Association of Louisiana, 443.

5. As the forfeiture of legal rights is not favored by the courts, the terms or conditions upon which a forfeiture shall happen must be strictly complied with.

Ibid.

SEE SHIPPING, No. 1—*Hanan & Richards v. Bowles*, 453.

INDICTMENT.

SEE CRIMINAL LAW AND PRACTICE.

INJUNCTION.

1. A mortgage creditor has no right to enjoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a higher rank, or a preference over him.
- Wells v. Wells*, 194.
2. Where creditors, who were by judgment entitled to be paid by preference, intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so

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INJUNCTION—Continued.

amended as to allow them twenty per cent. damages on their claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff who, by injunction, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted. *Ibid.*

3. The impracticability of the proceeding prescribed by law and the imposing of the cost thereof upon the purchaser of lands sold for taxes, are not good grounds for an injunction on the part of the taxpayer. The consequences referred to will rest with the State and the purchaser. *Gay v. Hebert, 196.*
4. An injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued. *Dupré v. Swafford, 222.*
5. Where it was pleaded that an injunction ought to be dissolved, because the party applying for it as tutrix set forth in her petition grounds which could have been urged in the defense to a petitory action against her individually: Held—That the plea is not valid. *Ibid.*
6. On the plea that a tutrix can not authorize another person to bind the minors on an injunction bond: Held—That it is the duty of a tutrix to protect the rights of her wards, and if, in the accomplishment of that duty, it becomes necessary to execute a judicial bond, she has the right to do so. *Ibid.*
7. The purchaser of mortgaged property with the pact *de non alienando*, occupies no better position than the mortgageor, and can not enjoin the executory proceedings, or set up any defense which the latter could not. *Lee v. Packard et al., 397.*
8. The plaintiff had no right to use the remedy of injunction in connection with his devolutive appeal, for the purpose of gaining the advantage of a suspensive appeal. There is neither law nor precedent for it. *Naughton v. Dinkgrare, 538.*
9. A district judge can not revise his decrees, by an injunction, on the ground of the insufficiency of proof. A new trial and an action of nullity are the only modes by which he can revise his judgments. *Ibid.*
10. After an execution is enjoined and a suspensive appeal taken from the judgment dissolving the injunction, the court is without power to order the sale of any part of the property under seizure and the proceeds to remain in the hands of the sheriff pending the appeal.

State ex rel. Mahan v. Judge of Fifth District Court, parish of Orleans, 666.

INJUNCTION—Continued.

11. The injunction bond is presumed to be ample protection to the plaintiff in execution, and until the injunction is finally determined, all proceedings in the case are suspended, except in regard to the appeal bond. *Ibid.*
12. While it is a general rule that petitions in injunction suits are not allowed to be amended, still when events have occurred since the institution of the suit, which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition. *Howard et al. v. Simmons et al.*, 668.
13. Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another. *Ibid.*

JUDGMENT.

1. It was immaterial at whose instance the judgment was signed. The law requires the judge to sign all definitive judgments. *State v. Wharton et al.*, 2.
2. When by the terms and conditions of a lease two lessees are bound *in solido*, a judgment from the court *a qua* against them jointly will be set aside, and if the judgment against one of the parties to the lease never had any legal force, it remains in full force against the other. *Moussier and Ourcelle v. Gustine and Sauvinet*, 36.
3. It can not be contended on the part of defendant that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent or had gone out of the parish, it was necessary to appoint an attorney upon whom service of the notice of judgment should have been made. *Holbrook v. Bronson*, 51.
4. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix were not absolute nullities, and can not be attacked collaterally. Where a divorced wife marries again, and after the death of her first husband claims to exercise her rights of tutorship by nature over the issue of her first marriage: Held—That the forfeiture announced in article 254 of the Revised Code has no application to her case. *Succession of Pinniger*, 53.
5. Where the claim by plaintiffs was to be reimbursed their own money, that was appropriated to the payment of a judgment for which the owners of a certain piece of property were liable, and which was rendered contradictorily with them: Held—That the payment of that judgment carried with it a legal subrogation of the plaintiffs to that judgment. *Mississippi and Mexican Gulf Ship Canal Co. v. Noyes et al.*, 62.
6. Where the demand was for the return and annulment of three hundred bonds alleged to have been issued after default, on its

JUDGMENT—Continued.

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Willis v. Wansley, 588.

33. Act No. 95, approved March 8, 1869, was passed, as its title announces, to carry into effect article 123 of the State constitution of 1868. The judgment which, in this instance, is the act of adjudication, stipulating the amount of the property held in common with a minor and adjudicated to her mother, was duly recorded in the book of mortgages, and was a compliance with the said law.

Winter v. Tounoir et al., 611.

34. The prescription of ten years set up by defendants does not apply to said judgment of adjudication. The judgment is not and was never intended by the law to be a judgment for money against the natural tutrix, upon which execution could issue in favor of the minor. *Ibid.*

35. The amount, however, of plaintiff's claim, so far as secured by mortgage, must be reduced, as it is shown that a portion of it was for the price of slaves adjudicated with lands. It was a sale, the price of which is still unpaid. The question has already been settled by this court, and is now jurisprudence. *Ibid.*

36. Where certain funds belonging to A were sequestered in the hands of B, his agent, at the suit of C, and said funds were paid to C, by virtue of a judgment which was not appealed from: Held—That the payment was good against A, who could not recover the amount from B, on the plea that he was not cited, and therefore was not bound by the judgment, because it was proved that he had ample notice and knowledge of the proceedings. He needed not the permission of B, his agent, and the garnishee in the suit, to appear in said suit, and could have appealed from the judgment, had he seen fit to do so. Under the circumstances of the case, as they appear in the record, B can not be forced to pay to A what he was compelled to pay to A's creditors by a court of competent jurisdiction.

Guidry v. Jeanneaud, 634.

37. Judgment dissolving an injunction against an order of seizure and sale without damages is simply a judgment of nonsuit, and seems naturally to blend itself with that ordering the sale; or, in other terms, it is in substance a repetition of the order first granted.

State ex rel. Richardson v. Judge Fourteenth Judicial District Court, 653.

GOVERNOR.

1. The Governor is not vested with the extraordinary discretion to determine who are the returning officers under the law.
State v. Wharton et al., 2.
2. The Governor is not vested by the act of 1872 with authority to appoint the officers of the returning board of election. *Ibid.*
3. The Governor was wholly without legal right to suspend or remove the Secretary of State *de facto*, recognized as such by a court of competent jurisdiction and by himself. *Ibid.*
4. The extrusion and exclusion of Bovee, the Secretary of State *de jure*, from said office by the Governor, did not and could not vest in the Governor the control of the office with the right to put in and put out the occupants thereof at his pleasure. There was no vacancy in the office of the Secretary of State, Bovee, the incumbent *de jure*, who was only excluded or suspended, and whose office was in the meanwhile filled by Herron, the Secretary of State *de facto*; and yet Wharton was appointed Secretary of State without reference to any removal or vacancy. The commission is without effect. *Ibid.*
5. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government. *State v. Doherty*, 119.
6. It does not follow that, because the State has appealed through the Attorney General, she can not appeal through the Governor as well. He clearly has the right to appeal on behalf of the State, and this right can not be taken away from him, simply because another officer of the government has been before him, when he takes the appeal within the delays required by law. In this case the appeal was taken in ample time.
State ex rel. Strauss v. Dubuclet, 161.
7. It is not legally correct to say that no person is authorized to appeal on behalf of the State, except in cases where the Attorney General is unable or unwilling to act. The prohibition is limited to the employment of counsel other than the Attorney General by the Treasurer and Auditor, and does not exclude the Governor from doing so. *Ibid.*
8. The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason, therefore, to maintain that article 61 of that instrument refers only to the regular or annual sessions of the General Assembly in relation to executive appointments. *State ex rel. Morgan v. Kennard*, 238.
9. The Warmoth commissions that were issued before the general election returns were reported and promulgated by the returning officers of the State, are null and void. *Kemp v. Ellis*, 253.

GOVERNOR—Continued.

10. A commission issued by the Governor must be recognized as having legal force, when it bears *prima facie* evidence of genuineness and validity, and nothing to the contrary is shown. *Ibid.*
11. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Collin v. Knoblock*, 563.
12. For certain reasons expressed in the statute of 1871, p. 126 of acts of 1871, prescribing the duties of tax collectors, the Governor is authorized to remove a tax collector from office. The relator in this case having a commission bearing date a month later than the commission of Yoist, the presumption is that the Governor had cause for removal of the latter, which was effected by the appointment of Dayries. *State ex rel. Dayries v. Yoist*, 396.
13. The Attorney General having neglected or declined to take an appeal, after having intervened and gone into the defense of the case, adopting the defense made by the Auditor and superadjoining grave objections to the relator's claim, it became the duty of the Governor, under this condition of affairs, to take, in the interest of the State, the appeal which he did.

State ex rel. Livingston v. Graham, 629.

GOVERNMENT OF THE UNITED STATES, ITS WAR POWERS.

SEE COURTS, No. 19 to 23—*Mechanics and Traders' Bank v. Union Bank*, 387.

GARNISHEE.

1. The garnishee is a stakeholder, and on his answers the judgment should be for or against him. He has no interest in the contest between the creditor and debtor. But where the object of a motion to strike out part of the answers of the garnishee and of the traverse of the answers, is to attack the settlement made between the garnishee and the judgment debtor, the garnishee must be permitted to explain that he holds the thing attempted to be seized, by virtue of a title acquired by a settlement between himself and his debtor. The plaintiff can not be allowed to change his garnishment process into a revocatory action. His remedy is by a direct action. The garnishee can not be divested of his possession and alleged ownership through any process which would deprive him of explanations and defenses allowable in a direct action by the judgment debtor to recover his property.

Hodges v. Graham, Hodges & Co., 365.

HOMESTEAD.

1. The benefit of the homestead act can be pleaded in bar of the foreclosure of a conventional mortgage given on the homestead sub-

HOMESTEAD—Continued.

sequent to the enactment of the law. It can not be rightfully contended that, in consenting to the mortgage, the plaintiff in injunction waived the benefit of this exemption, and that it amounted to a renunciation of the right. No one is presumed to waive a legal right, and every contract is supposed to be made in reference to the law that governs it. In this case there was no express renunciation or waiver. *Leblanc v. St. Germain*, 289.

2. Where a widow, in necessitous circumstances, opposes the administrator's account of a deceased husband's estate, claiming that she is entitled to one thousand dollars under the homestead act, and it appears that the children own more than one thousand dollars in their own right, the widow does not come within the provisions of the statute. *Succession of Melançon*, 535.

SEE LAWS, No. 9—*Mills v. Sheriff of East Feliciana et al.*, 142.

No. 13—*Robert v. Coco*, 199.

HEIRS.

SEE SUCCESSION, EXECUTOR AND ADMINISTRATOR.

HUSBAND AND WIFE.

SEE MARRIAGE.

SEE COMMUNITY.

INSURANCE.

1. A river policy of insurance, No. 208, was executed in favor of A on the first of February, 1867, according to all the forms prescribed by the charter and by-laws of the company. The insurance was "on account of whom it may concern, on such property lost or not lost, and in such sums, to and from such ports or places, and by such good and seaworthy steamboats or other river craft as may be approved by the company and entered in the book attached to the policy; it being expressly understood and agreed that no risk under this insurance is or shall be binding unless so approved and entered." Subsequently, on the fourth of same month, A, under the open river policy No. 208, made a special application, which was accepted, to have all the merchandise shipped to him on the Ohio and Mississippi rivers and their navigable tributaries, covered without being entered in the book attached to the policy, the risk on any one boat being limited to \$5000, and he binding himself to report the shipment as soon as notice thereof was received by bill of lading or otherwise. On the ninth of April, A had an entry made in the book attached to his policy by which merchandise shipped to him from Montgomery on the Alabama river was covered. The merchandise had been burned on the seventh of same month, but A had no knowledge of the fact at the time of the entry: Held—That the entry was regularly made and within the terms of the open policy; that said policy author-

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INSURANCE—Continued.

ized the risk from the port of Montgomery, on the Alabama river; and that the special application was an additional agreement containing certain stipulations, none of which modified the open policy so as to limit the risks to the Ohio and Mississippi rivers and their navigable tributaries.

Marx v. National Marine Fire and Insurance Company, 39.

2. Where the stipulation is that the property to be insured shall be covered, lost or not lost, and no fraud has been established against the insured, the contract of insurance becomes operative and covers the property whether lost or not lost at the time of the entry.

Ibid.

3. Where the suit was on promissory notes given as premiums on policies of insurance to a company, and the plea in defense a want of consideration, on the ground that the policies, if issued, were not in accordance with the instructions from the party intending to be insured to the agents of said company, and did not cover the risks stipulated in the application; and where the issue was that the policies never were issued and delivered to the applicant, the proofs, which should be in the possession of the plaintiff, not being found in the record, there will be a judgment of nonsuit.

Eureka Insurance Company v. Tobin et al., 121.

4. Where an insurance company notified the insured that a forfeiture would not be claimed for non-payment of assessments, till thirty days after the publication of a notice of the call, for eight consecutive days, the said company should have made the publication and given the delay, because the insured had the right to expect it, and is presumed to have acted upon it.

Fitzpatrick v. Mutual Insurance and Benevolent Life Association of Louisiana, 443.

5. As the forfeiture of legal rights is not favored by the courts, the terms or conditions upon which a forfeiture shall happen must be strictly complied with.

Ibid.

SEE SHIPPING, No. 1—*Hanan & Richards v. Bowles*, 453.

INDICTMENT.

SEE CRIMINAL LAW AND PRACTICE.

INJUNCTION.

1. A mortgage creditor has no right to enjoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a higher rank, or a preference over him.
- Wells v. Wells*, 194.
2. Where creditors, who were by judgment entitled to be paid by preference, intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so

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INJUNCTION—Continued.

amended as to allow them twenty per cent. damages on their claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff who, by injunction, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted. *Ibid.*

3. The impracticability of the proceeding prescribed by law and the imposing of the cost thereof upon the purchaser of lands sold for taxes, are not good grounds for an injunction on the part of the taxpayer. The consequences referred to will rest with the State and the purchaser. *Gay v. Hebert, 196.*
4. An injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued. *Dupré v. Swafford, 222.*
5. Where it was pleaded that an injunction ought to be dissolved, because the party applying for it as tutrix set forth in her petition grounds which could have been urged in the defense to a petitory action against her individually: Held—That the plea is not valid. *Ibid.*
6. On the plea that a tutrix can not authorize another person to bind the minors on an injunction bond: Held—That it is the duty of a tutrix to protect the rights of her wards, and if, in the accomplishment of that duty, it becomes necessary to execute a judicial bond, she has the right to do so. *Ibid.*
7. The purchaser of mortgaged property with the pact *de non alienando*, occupies no better position than the mortgageor, and can not injoin the executory proceedings, or set up any defense which the latter could not. *Lee v. Packard et al., 397.*
8. The plaintiff had no right to use the remedy of injunction in connection with his devolutive appeal, for the purpose of gaining the advantage of a suspensive appeal. There is neither law nor precedent for it. *Naughton v. Dinkgrare, 538.*
9. A district judge can not revise his decrees, by an injunction, on the ground of the insufficiency of proof. A new trial and an action of nullity are the only modes by which he can revise his judgments. *Ibid.*
10. After an execution is enjoined and a suspensive appeal taken from the judgment dissolving the injunction, the court is without power to order the sale of any part of the property under seizure and the proceeds to remain in the hands of the sheriff pending the appeal.

State ex rel. Mahan v. Judge of Fifth District Court, parish of Orleans, 666.

INJUNCTION—Continued.

11. The injunction bond is presumed to be ample protection to the plaintiff in execution, and until the injunction is finally determined, all proceedings in the case are suspended, except in regard to the appeal bond. *Ibid.*
12. While it is a general rule that petitions in injunction suits are not allowed to be amended, still when events have occurred since the institution of the suit, which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition. *Howard et al. v. Simmons et al.*, 668.
13. Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another. *Ibid.*

JUDGMENT.

1. It was immaterial at whose instance the judgment was signed. The law requires the judge to sign all definitive judgments. *State v. Wharton et al.*, 2.
2. When by the terms and conditions of a lease two lessees are bound *in solido*, a judgment from the court *a qua* against them jointly will be set aside, and if the judgment against one of the parties to the lease never had any legal force, it remains in full force against the other. *Moussier and Courcelle v. Gustine and Sauvinet*, 36.
3. It can not be contended on the part of defendant that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent or had gone out of the parish, it was necessary to appoint an attorney upon whom service of the notice of judgment should have been made. *Holbrook v. Bronson*, 51.
4. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix were not absolute nullities, and can not be attacked collaterally. Where a divorced wife marries again, and after the death of her first husband claims to exercise her rights of tutorship by nature over the issue of her first marriage: Held—That the forfeiture announced in article 254 of the Revised Code has no application to her case. *Succession of Pinniger*, 53.
5. Where the claim by plaintiffs was to be reimbursed their own money, that was appropriated to the payment of a judgment for which the owners of a certain piece of property were liable, and which was rendered contradictorily with them: Held—That the payment of that judgment carried with it a legal subrogation of the plaintiffs to that judgment. *Mississippi and Mexican Gulf Ship Canal Co. v. Noyes et al.*, 62.
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A party has no right to demand the nullity of a judgment rendered against him, because the attorney who acted on his behalf without authority, after permitting that attorney to continue the litigation, and after taking the chances of a favorable judgment in this court.

Willis v. Wansley, 588.

7433. Act No. 95, approved March 8, 1869, was passed, as its title announces, to carry into effect article 123 of the State constitution of 1868. The judgment which, in this instance, is the act of adjudication, stipulating the amount of the property held in common with a minor and adjudicated to her mother, was duly recorded in the book of mortgages, and was a compliance with the said law.

Winter v. Tounoir et al., 611.

34. The prescription of ten years set up by defendants does not apply to said judgment of adjudication. The judgment is not and was never intended by the law to be a judgment for money against the natural tutrix, upon which execution could issue in favor of the minor. *Ibid.*

35. The amount, however, of plaintiff's claim, so far as secured by mortgage, must be reduced, as it is shown that a portion of it was for the price of slaves adjudicated with lands. It was a sale, the price of which is still unpaid. The question has already been settled by this court, and is now jurisprudence. *Ibid.*

36. Where certain funds belonging to A were sequestered in the hands of B, his agent, at the suit of C, and said funds were paid to C, by virtue of a judgment which was not appealed from: Held—That the payment was good against A, who could not recover the amount from B, on the plea that he was not cited, and therefore was not bound by the judgment, because it was proved that he had ample notice and knowledge of the proceedings. He needed not the permission of B, his agent, and the garnishee in the suit, to appear in said suit, and could have appealed from the judgment, had he seen fit to do so. Under the circumstances of the case, as they appear in the record, B can not be forced to pay to A what he was compelled to pay to A's creditors by a court of competent jurisdiction.

Guidry v. Jeanneaud, 634.

37. Judgment dissolving an injunction against an order of seizure and sale without damages is simply a judgment of nonsuit, and seems naturally to blend itself with that ordering the sale; or, in other terms, it is in substance a repetition of the order first granted.

State ex rel. Richardson v. Judge Fourteenth Judicial District Court, 653.

JUDGMENT—Continued.

38. Where the irregularities in the proceedings in the court *a quo*, which are complained of, are more technical than real, and where, on the whole, substantial justice has been done, the judgment will not be disturbed. *Howard et al. v. Simmons et al.*, 668.

SEE EVIDENCE, Nos. 16, 20—*State v. Hardin*, 369.

No. 35—*Gerspach & Herring v. Mullin*, 599.

SEE EXECUTOR AND ADMINISTRATOR, No. 14—*Succession of Hardy*, 489.

SEE INJUNCTION, No 9—*Naughton v. Dinkgrave*, 538.

SEE CONSTITUTION AND CONSTITUTIONAL LAW, No. 10—*Morrison v. Flourney*, 545.

SEE APPEAL, Nos. 43, 44—*State ex rel. Richardson v. Judge Fourteenth Judicial District Court*, 653.

JOINT OWNERS.

1. Where one of the joint owners of property claims from the other parties commissions for collecting rents and keeping the premises in repair, he must show an agreement on which to base his charge.

Conrad v. Burbank, 112.

2. Where the plaintiff, alleging that the succession represented by him was the joint owner with the defendant of a steamboat, sued to have the right of the succession recognized and for its share in the net earnings of the boat while in the possession of the defendant, and said defendant excepting that, if the plaintiff had any rights, which is denied, the present suit was not the form in which they can be asserted, contended that said plaintiff must sue for a general settlement, the exception must be overruled.

Labit v. Francioni, 488.

3. The mere fact of being joint partners of a steamboat did not constitute plaintiff and defendant owners, when there is in the record no evidence of partnership. *Ibid.*

4. Plaintiff is entitled to claim his right to the boat if he be a joint owner, and if he has asked for a share of the earnings of the boat, instead of the price of the use of his property, it does not follow that he will get it, or that he is therefore a partner. *Ibid.*

JUSTICES OF THE PEACE.

1. The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, page 414, Ray's Revised Statutes. It is confined to civil matters, and there is no other law conferring upon them criminal jurisdiction.

State ex rel. Saddler v. Landry, 60.

JURIES AND JURORS.

1. A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties

JURIES AND JURORS—Continued.

to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws." This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned. *Adams v. Webster*, 113.

2. Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties. *Ibid.*

3. Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where, on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto: Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary. *State v. Branch*, 115.

4. The provisions of the federal constitution relative to juries in civil cases refer only to trials in the federal courts, and not to those in the State courts. *State ex rel. Morgan v. Kennard*, 238.

5. The fourteenth amendment of the constitution of the United States does not make any change on the subject of jury trials in civil suits. *Ibid.*

6. Where the judge of the district court was of opinion that the verdict of the jury was in direct and flagrant violation of law and evidence, and in utter disregard of his charge, he should have set the verdict aside and granted a new trial, as asked for. It is impossible to sanction the practice, become too common, that an inferior judge should sign a judgment which he believes and avers to be wrong, in the hope that this court will set it aside.

Halliday v. Lanata, 373.

7. Where counsel for appellee complained that, before this court should have set aside the verdict of the jury and remanded the case, it should have decided that their finding was erroneous: Held—That there was force in this criticism of the decree, and that a rehearing should be granted as prayed for. *Ibid.*

SEE NEW TRIAL, No. 1 and 2—*Adams v. Webster*, 113.

SEE CRIMINAL LAW, No. 7—*State v. Petrie*, 336.

SEE CRIMINAL LAW AND PRACTICE, Nos. 13, 14, 15, 16—*State Jean Gay*, 472. *State v. Prudhomme*, 522. *State v. Jackson*, 537. Nos. 24, 27, 29—*State v. Turner*, 573.

SEE SHERIFF, No. 4—*State v. Burns*, 302.

SEE EVIDENCE, No. 16.—*State v. Hardin*, 369.

JURISDICTION.

1. On a motion to dismiss an appeal on the ground that the matter in dispute does not exceed five hundred dollars, the amount of defendant's liabilities on a stock note as stockholder in a company will determine the jurisdiction of the court and not the percentage claimed thereon. It must be first ascertained if he is liable on the stock note itself, as alleged in the petition.

Psychaud v. Weber, 133.

2. When the object of a suit is to provide the means of paying the debts of a company, it is unnecessary to decide on an exception to the jurisdiction, whether the State courts can settle the affairs of an insolvent corporation.

Ibid.

3. Where a judgment creditor with special mortgage and vendor's privilege caused a *fi. fa.* to be issued by the district court against the property of a succession, which *fi. fa.* was enjoined by the executor of said succession, and where, whilst the injunction was pending said executor applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction, for the purpose of paying the debts of the succession, and the court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ: Held—That the court erred in not granting the order prayed for by the executor. Succession property can not be sold under a *fi. fa.* The executor was in possession of the property when seized, and the probate court had jurisdiction to order the sale. No injury can result to the judgment creditor by authorizing the sale prayed for by the executor if he has a mortgage superior to other creditors.

Succession of Patrick, 154.

4. The Second District Court of the parish of Orleans has only probate jurisdiction, and had not jurisdiction to try the suit against the heir who had been put in possession of the property of the succession.

Martin v. Cannon, 225.

5. Where the heirs of the deceased had accepted the succession unconditionally and the evidence showed that they were in possession of the property of the succession: Held—That the suit was improperly brought against them in the probate court; it should have been instituted in the district court; the exception to the jurisdiction is well founded.

Succession of Widow de Gréhan, 334.

6. The Second District Court has only probate jurisdiction. This suit against the defendants, sureties of one McPhelin, the former administrator of the succession of Lorenzo Hillerman, and now deceased, should not have been brought in the Second District

JURISDICTION—Continued.

Court, because said suit is not probate in its character, but is simply one to enforce an obligation contracted by defendants.

Larue v. Vanhorn et al., 445.

7. The parish court has jurisdiction of suits for the recognition of heirship and for the partition of succession property, and where the amount involved exceeds five hundred dollars, the appeal is directly to this court.

Malone v. Casey, 466.

8. Where the character of the suit, as ascertained from the prayer of the petition, is not an action of revindication, but is simply a suit to annul a will, because the formalities prescribed by law were not observed in making it, the parish court, which admitted the will to probate, has jurisdiction of the case.

Thibodeaux v. Voorhies, 479.

9. The district court has no jurisdiction over this cause. It involves the examination and correction of a tutor's accounts, and, as set out, is virtually an opposition to said accounts, which are in the probate court, and of which the parish court has jurisdiction, although the amount involved exceeds five hundred dollars. Constitution 87, 88.

Lay v. Succession of O'Neal, 603.

10. By the allegations in the petition the tutor's annual accounts, or some of them, are homologated by the probate court, and the opposition to them must be made in the same tribunal.
11. The object of the limitation in the constitution to the jurisdiction of the Supreme Court is simply to exclude from it such controversies as are of minor importance.

State v. Wharton et al., 2.

12. Where the interest of the State and of the people of the State in the correctness of the ruling of the judge *a quo* is of such magnitude as in this case, the court will not, on a bald technicality, refuse to entertain jurisdiction of the cause, even if there were no pecuniary interest shown, which, however, is not the case in this suit.

Ibid.

13. Article 141 R. C. C. is to be construed as applying to the defendant who is absent, or incapable of acting, at the institution of the suit, and can not be cited in the usual way, but not to one who is legally and regularly a party to a suit and who voluntarily declines making a defense or temporarily leaves the place of the jurisdiction after being cited. The jurisdiction of the court can not thus be defeated.

Holbrook v. Bronson, 51.

14. The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, page 414, Ray's Revised Statutes. It is confined to civil matters, and there is no other law conferring upon them criminal jurisdiction.

State ex rel. Saddler v. Landry, 60.

JURISDICTION—Continued.

15. Where the judge of the Second District Court, parish of Orleans, had refused to transfer a cause to the Circuit Court of the United States, because that court has not jurisdiction to try the principal, if not the only object of the suit, which was the legality and sufficiency of the evidence upon which a lost will was admitted to probate, and the revocation of said will: Held—That the United States Courts are without jurisdiction in probate matters, and that this point is too well settled to be now questioned. It is equally well settled that it was not intended to extend the jurisdiction of the United States courts over causes brought before them on removal, beyond the limits prescribed by their original jurisdiction. The subject matter of this suit is purely probate in its character, to wit: The revocation of the probate of a will, and the suit was properly brought, *under the circumstances of the case*, in the probate court which had made the order to record and execute the will.

Fuentes v. Gaines, 85.

16. Where parties can not attack the probate of a will in the Circuit Court of the United States, before which the petitory action against them has been brought, they should be permitted, *ex necessitate rei*, to bring the suit in the State probate court in which the order for probate was granted. Otherwise, it would be possible for a will to be fraudulently probated, and a suit to be instituted against persons in possession under titles from the heirs in the Circuit Court of the United States, without the possibility on the part of the possessors to expose the fraud. *Ibid.*

17. Where a motion as to the disqualification of a grand juror, which rested on questions of facts, was overruled, and no bill of exceptions taken: Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes.

State v. Branch, 115.

SEE ACTION, No. 17—*Gantt v. Easton et al.*, 507.

LEASES.

1. When by the terms and conditions of a lease two lessees are bound *in solido*, a judgment from the court *a qua* against them jointly will be set aside, and if the judgment against one of the parties to the lease never had any legal force it remains in full force against the other. *Moussier and Courcelle v. Gustine and Saurinet*, 36.
2. The lessee has the right to sublease when there is no interdiction to that effect, and on such terms as may be agreed on between him and the sublessee, and where it is shown that the sublessee did not make any payment in anticipation of the terms of his contract, he is not liable to the lessor for more than he owes the principal lessee. No law is referred to by the plaintiff which requires the lease made in this instance by the principal lessee to the sublessee to be in writing. *Weatherly v. Baker*, 229.

LIBEL AND SLANDER.

1. The publication of any communication with or without the name of the author, which is defamatory and false, subjects the publisher as well as the author to damages in favor of the party aggrieved. *Perret v. New Orleans Times Newspaper*, 170.
2. The law looks to the animus of the publisher in permitting his columns to be used as a vehicle for the dissemination of calumny. In such a case, it is not incumbent upon the party assailed by defamation to show malice against himself on the part of the publisher, nor to prove that he has received injury by the publication. If the charges are false, the law implies malice in the publisher—not a malice which means a spite against the individual, but *malus animus*—a wanton disposition grossly negligent of the rights of others; and the injury inflicted is not repaired by the subsequent retraction or apology of the publisher, however promptly it may be made. *Ibid.*
3. The proprietor of a newspaper is not exonerated from responsibility, because the libelous matter appearing in his paper was inserted without his knowledge, or approbation, or even against his wishes. He is responsible for the acts of his agents and employes. *Ibid.*
4. It is not sufficient for his exoneration that the printer, by naming the author, gives the party aggrieved an action against him. *Ibid.*
5. A reparation by recantation can only be considered in estimating the amount of damages. *Ibid.*
6. In an action of libel it is not necessary to prove any special damage to recover. *Ibid.*
7. By the statute of 1855, Revised Statutes, p. 706, sections 3640 and 3641, the truth of libelous matter may be pleaded in justification, and if it shall appear that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted. *Ibid.*

LAWS AND STATUTES.

1. Where it is clearly the purpose of the Legislature to give a company time within which they would have an opportunity to accept certain conditions imposed by that body, it can not be contended that official negligence in promulgating the law, should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept; it would enable such official negligence to defeat the legislator's will.
State v. North Louisiana and Texas Railroad Company. 65.
2. On the question in this case whether the act No. 97 of 1872, relied on by the defendants, is null and void on the ground of its being in conflict with the prohibition in article 111 of the constitution, because it has repealed, without containing any adequate provision

LAWS AND STATUTES—Continued.

for the same purpose, that provision of act No. 108 of 1868, obligating the defendants to deposit in the State Treasury, at prescribed dates, the money to pay certain bonds and interest coupons issued—which obligation was secured by a second mortgage on the railroad, its fixtures, and appurtenances: Held, *First*—That the State by making the act No. 108 of 1868, the basis of its suit, recognized and affirmed its constitutionality in regard to the adequate ways and means provided for the payment of the current interest and the principal of the bonds. *Second*—That there is nothing in the record to enable the court to determine whether or not the provision made in the law of 1872 is an adequate provision for the payment of the principal and interest of the debt created by the law of 1868, and that there may be a reasonable doubt as to whether the act of the later date actually repeals that of the earlier, in the contemplation of article 111 of the constitution. *Third*—That the law creating the debt is certainly not repealed, and that the debt of the State so created being still in existence, the State is precluded, in this proceeding at least, from contesting its validity, or that of the means first provided for its payment; and that it is only the form and nature of the security required of the railroad company that has been changed. *Fourth*—That it was proper to conclude that there is such reasonable doubt with regard to the unconstitutionality relied on, as, under the well settled jurisprudence of this State and country, to justify the court in not annulling the legislative enactments referred to in this case. When there is a doubt, a law will not be held unconstitutional. *Fifth*—That this is a controversy between the State, which issued the bonds, and the railroad company for whose benefit they were issued; that the holders of the bonds and their rights are not before the court, nor any claim to enforce the payment of said bonds; that the State having paid some of the interest on them which it alleges the company were obliged to pay, and now seeking to collect back the same, the plea that the company settled with the State in accordance with act No. 97 of 1872, is a valid defense. There is nothing in the constitution inhibiting the State from accepting from its debtors such settlements as the Legislature may think judicious. *Ibid.*

3. The act No. 6 of 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans and raise a revenue for that purpose," authorizes the removal of the division superintendents upon certain contingencies, and the mere fact of plaintiff's removal is presumptive evidence that it was made for a proper cause. It was incumbent on him to show that the removal was without cause or not in conformity with existing laws.

State ex rel. Richardson v. Graham, 73.

LAWS AND STATUTES—Continued.

4. The sixth section of the act of 1868, p. 194, concerning the transfer of bills of lading and the effects of that transfer, is only a legislative sanction given to the commercial law of universal application, by which it is held that a bill of lading, legally transferred, gives title to the property it represents. It does not clash with the statute of 1855 incorporated in the 3227th article of the Civil Code.

Delgado & Co. v. Wilbur & Co., 82.

5. The article 3227 does not give any privilege upon produce sold for cash. A sale for cash means that, when the property is delivered, the money is to be paid, and where not paid after delivery, so long as the property remains in the possession and under the control of the vendee, the vendor's lien remains as between the parties, but the lien does not follow it when it passes into the hands of innocent third parties. Vendors can not complain if they sell for cash and still allow purchasers to take away the goods without paying for the same. The fault being with them, the loss, if any, must be theirs also. *Ibid.*

6. Where the property in controversy is situated in Louisiana, within whose limits the owners thereof reside, their rights can only be barred by the laws of this State, which are binding on the Federal as well as the State courts. The Federal courts do not claim to bring foreign laws into this State. *Fuentes v. Gaines*, 86.

7. The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former.

State v. Doherty, 119.

8. Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it: Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract.

Mills v. Sheriff of East Feliciana et al., 142.

9. Where defendants received a certain quantity of cotton, sold it, and collected the proceeds of the sale as commission merchants or factors of the plaintiff: Held—That the debt resulting from it is a fiduciary one, and exempted by the insolvent law from its operation. The money was received in trust for the plaintiff. Defendants, by converting it to their own use, rendered themselves amenable to the criminal laws of the State. It can not, therefore, be inferred that the insolvent laws of the State intended to discharge a debtor from such a debt, even if it had not been therein expressly excepted. *Tate v. Laforest*, 187.

LAWS AND STATUTES—Continued:

10. By the laws of Louisiana native born free persons of color were in the full enjoyment of the so-called private rights in 1844.
Walsh v. Lallande, 188.
11. The object of section forty of the revenue law of 1871 is to give the taxpayer notice, that he may have an opportunity to have errors corrected and a just assessment made. Where it is proved that he had such notice, he has no cause to complain.
Gay v. Hebert, 196.
12. The homestead law, exempting certain property from seizure on a judgment enforcing a mere ordinary debt, is not unconstitutional. The rights of the creditor, and not his security, unless the security forms part of his contract, must be invaded before he can invoke the constitutional privilege on which he relies. The law in this case does not affect his vested rights, but only impairs his security for the payment of his claim.
Robert v. Coco, 199.
13. Construing the statute of twenty-eighth February, 1870, in connection with section 3990 of the Revised Statutes, the sense resulting from both is, that section 3990 of the Revised Statutes does not include within its general sweep the acts of the General Assembly during the session of 1870. On the contrary, the acts and joint resolutions of the General Assembly passed during the session of 1870 should take precedence of the act adopting the Revised Statutes, and be held as repealing in whole or in part any of those revised statutes that might be found to be in opposition or in conflict with the enactments or joint resolutions of the session of 1870.
Succession of Winn, 216.
14. The State law of January 13, 1873, merely provides a more speedy remedy for the settlement of contests for judicial offices. It is not violative of section 1 of article 14 of the constitution of the United States. Should it even be admitted that the law authorizes the suit in the name alone of the party claiming an office, the fact that the State has joined with him in his demand, advocated by private counsel, does not invalidate the proceedings. *Utile per inutile non vitiatur.* *State ex rel. Morgan v. Kennard*, 238.
15. The provisions of the act of the Legislature, No. 39, 1873, for transferring cases are not repugnant to articles 13, 90 and 114 of the State constitution.
Kemp v. Ellis, 253.
16. With the character of laws as being odious, or entitled to favor, courts have not to deal.
Collin v. Knoblock, 263.
17. It is only under the statutory provision of 1855 that courts can proceed, in relation to parish offices, and through the agency of juries, to supervise the counting of votes, correct calculations, purge the polls of illegal votes, ascertain and establish majorities. It is confined to cases where no commissions have issued. *Ibid.*

LAWS AND STATUTES—Continued.

18. The subject matter of proceedings under the intrusion act is widely different from that of the statute of 1855. In cases under the intrusion law, courts can not go beyond commissions legally issued. *Ibid.*

19. Rights may be acquired under a law, notwithstanding that law may have been subsequently declared to have been unconstitutional. To escape the penalties inflicted by a law, or avoid responsibilities imposed by it, upon the ground that it is unconstitutional, its unconstitutionality must be distinctly declared before the penalty or responsibility has accrued.

Factors and Traders' Insurance Co. v. City of New Orleans, 454.

20. In the laws of the United States or proclamations of the President prohibiting, during the late war, any intercourse and trade between persons residing within the Federal and Confederate lines, there is nothing which could prevent a French citizen from acknowledging a debt and agreeing to pay it, and mortgaging his property to secure its payment. *Banker v. Durand*, 511.

21. When a law is susceptible of two constructions, the one which will give effect to the law, rather than the one which would render the law unconstitutional, must be adopted.

City of New Orleans v. Salamander Insurance Company, 650.

SEE CONSTITUTION AND CONSTITUTIONAL LAW, Nos. 11 to 18—

Whited v. Lewis, 568.

SEE OFFICE AND OFFICERS.

MINORS.

1. There is no difficulty in the objection that the plaintiff can not enforce this claim, because of the informalities of the transfer thereof by the natural tutor. This is a question that concerns the minors. The formalities for the alienation of their property being alone for their benefit, they alone can urge the omission thereof. But, at the time of the transfer in this case, the heirs were of age, and they received the money paid by the transferee.

Seyburn v. Deyris, 483.

SEE TUTORS AND TUTORSHIP.

MANDAMUS.

1. The Recorder of Mortgages is not mentioned in section 52 of act 42 of 1871, and this court can not supply the omission, if it be an omission. If the relator has registered mortgages in favor of the State and the State has not paid him therefor, and his compensation is not otherwise provided for by law, and his legal demands have not been complied with, he may have his recourse against the State, but his remedy is not by mandamus against the Auditor.

State ex rel. Recorder of Mortgages v. Clinton, 285.

MANDAMUS—Continued.

2. Where the Board of Selectmen of a city have the right to be the judges of their own election and of that of their officers, it is not merely a ministerial duty which they have to perform, it involves discretion and a mandamus can not be used to enforce the performance of a discretionary duty.

State ex rel. Shorten v. Board of Selectmen of the city of Baton Rouge, 310.

3. Where the relator sought by mandamus to compel the Selectmen of the city of Baton Rouge to issue to him a certificate of election and to recognize him as mayor of that city, on the ground that the election commissioners had decided he was elected, and that the Selectmen can not determine that he was not elected, because no one but a judge can decide the question: Held—That the Board of Selectmen can, under the eighth section of the city charter, exercise their discretion so far as to determine the relator's right to the certificate, and that the use of this discretion is not the exercise of judicial powers in the sense of the constitution, and therefore not repugnant to the article ninety-four of that instrument. The action of the Board of Selectmen is not conclusive of the rights of the relator. He can sue for the office, but he can not proceed by mandamus. *Ibid.*

4. To authorize a writ of mandamus, there must appear a specific ministerial duty which the applicant has a direct right or interest in having enforced. *Mossy v. Harris*, 623.

5. Where the pleadings indicate that the application is simply to obtain a judicial order in favor generally of holders of a certain class of warrants, and not to secure a specific right to a particular party, it is not a serious contest, and not a case for a mandamus. *Ibid.*

SEE STOCKHOLDERS AND STOCKS, No. 4—*State ex rel. Philips v. New Orleans Gas Light Company*, 413.

MARRIAGE.

1. A married woman can not be sued on the ground that, being shown to be the keeper of a boarding house and therefore a public merchant, no authorization is necessary either from her husband or the court. *Moussier & Courcelle v. Gustine & Sauvinet*, 36.
2. Articles 121 and 131 of the Civil Code can not be construed to warrant the conclusion that the carrying on of any other business by a married woman than that of merchandise constitutes her a public merchant. *Ibid.*
3. The words "separate trade" in the latter clause of article 131 of the Civil Code, declaring that the wife "is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband," refer clearly to the trade in merchandise and not to any other business or pursuit. *Ibid.*

MARRIAGE—Continued.

4. Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice. *Holbrook v. Bronson*, 51.
5. Where the husband has not appeared with his wife, in the suit instituted by her, the latter must show his authorization. Her own averments, or those of her counsel as to that fact are not sufficient. *Sommers v. Schmidt*, 93.
6. Where the husband joins the wife in her petition, this is sufficient authorization to her to sue. *Succession of Payne*, 202.
7. Where a fair and correct settlement was made between A. Verret and his sons-in-law, W. H. and J. M. Knight, in which the mortgage judgments in favor of their wives against Verret were placed to their credit and reduced their own indebtedness *pro tanto*, and subsequently W. H. and J. M. Knight transferred said judgments to Adams & Co., and their wives ratified the transfer: Held—That Adams & Co., obtained no mortgage under said transfer, because the judgments thus transferred had been extinguished by the settlement between W. H. Knight, J. M. Knight and A. Verret, which was a valid one. The husbands could have sold those judgments or collected the amount of the judgments and used the money in payment of their debts, or in any other way they had chosen. *Miltenberger v. Keys*, 287.
8. The power of the husband to administer the wife's property is different from that of an ordinary attorney. One essential difference is, that the husband may lawfully appropriate to his own use the money of his wife, collected by him. The attorney can not. *Ibid.*
9. Where there is community between husband and wife, the husband is the head of it, and is responsible for the debts of the community. The death of his wife does not deprive him of the right to make *bona fide* settlements for the payments of the debts of the community, nor do such settlements novate the debts as to the community. The community property is liable for the community debts. *Rusk v. Warren et al.*, 314.
10. Where a suit was brought against a wife after her husband's death, on a promissory note made by said wife and her husband *in solido*, and secured by a mortgage on property standing in the name of the wife, but purchased during the existence of the community: Held—That she could not bind herself with her husband by borrowing money to pay for said community property. *Millaudon v. Widow Carson*, 380.

MARRIAGE—Continued.

11. Parties to a marriage contract in Louisiana can agree therein, that the property they may acquire by succession or donation during marriage shall fall into the community of acquets and gains, and the father and mother of the parties to the marriage can give, for the benefit of said parties, the whole or a part of the property they may have on the day of their decease.

Desobry v. Schlater et al., 425.

12. Parties may stipulate as they like, provided the thing stipulated is not in contravention of a prohibitory law. Any stipulation, therefore, in a marriage contract, which is not in violation of a prohibitory law, is binding upon the contracting parties as long as the contract lasts.

Ibid.

13. All stipulations which the law permits to be made in marriage contracts may be altered by the husband and wife jointly before the celebration of the marriage, but not afterwards. As they bind themselves at the time of the marriage, so they remain bound so long as the marriage lasts.

Ibid.

14. Whether the stipulations of a marriage contract can be subsequently changed or not, it is clear that the changing of said contract would be, in reality, a new one, and that, as such, it would have to be entered into by all those who were parties to the first contract, and that the stipulations to that effect should be positively stated.

Ibid.

15. The fruits of community property belong to the community and are liable to seizure in payment of a community debt.

Ibid.

16. Emancipation gave to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, although dormant during the slavery of the parties, produced, from the moment of their freedom, all the effects which result from such contract among free persons.

Pierre v. Fontenette et al., 617.

17. But the marriage which was to produce these civil results must have existed at the time the emancipation took place. If the marriage was dissolved before emancipation, the parties' rights were no longer dormant; they were dead; and the subsequent emancipation, as it could not resuscitate the marriage, could produce none of the civil fruits which are the results of a civil marriage.

SEE COMMUNITY.

Ibid.

MORTGAGES.

1. The object of registry both of sales and mortgages is notice, and when the recorder registers a private sale, whether he has done so on sufficient proof is immaterial as regards notice to the public; the object of the law is fulfilled, and subsequent purchasers are affected.

Pierce v. Clark and sheriff, 111.

MORTGAGES—Continued.

2. The failure of the recorder to inscribe with the instrument the proof upon which he admits it to registry does not render the registry null. *Ibid.*
3. A judicial mortgage, like any other, must be reinscribed within ten years from the first inscription in order to preserve the rank acquired by said inscription. *Carroll et al. v. Seip et al.*, 141.
4. Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it: Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract. *Mills v. Sheriff of East Feliciana*, 142.
5. The mere recital of an act of mortgage in a subsequent act acknowledging the obligations contained in the first act, does not, as to third parties at least, operate the reinscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription as to the debt, but does not reinscribe the mortgage which secured it. Where the plaintiff's mortgage was in existence at the time of the sheriff's sale, and the mortgaged property was adjudicated to him, he had the right to retain the purchase money up to the amount of his debt, and the title to the property should have been made to him. *Blair & Co. v. Taylor et al.*, 144.
6. The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceedings or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession. *Ball et al. v. Estate of Sharpley Owen*, 195.
7. The second mortgage creditor has no action against the prior mortgage creditor for the balance remaining in the sheriff's hands or the hands of the purchaser, and the plaintiff, who gets his judgment paid has no right to object to the payment of the second mortgage. *City of Baltimore v. Parlange*, 335.
8. Where the evidence shows that A owed the Merchants' Mutual Insurance Company ten thousand dollars; that he executed in favor of said company a mortgage of fifteen thousand dollars to secure the payment of two promissory notes, one for \$10,000 and the other for \$5000, to the order of the maker and indorsed in blank; that he tried to have the company to discount these notes and pay itself out of the proceeds; that the company took the ten

MORTGAGES—Continued.

thousand dollar note, but returned the five thousand dollar note to the maker; and that B became the owner of it in good faith and for a valuable consideration: Held—That on the Merchants' Mutual Insurance Company foreclosing the mortgage for the ten thousand dollar note and becoming the purchaser of the property at sheriff's sale, it had no right to curtail that mortgage to its advantage; that there was no extinguishment thereof by confusion, and that B had a right to one-third of the net proceeds of the sale.

Mechanics Mutual Insurance Company v. Jamison, 363.

9. No sale or partition of mortgaged premises can defeat the mortgage previously existing thereon. The purchase of the property by Packard et als., the stipulations and arguments between them and the mortgageor, and the partition of the property among themselves, could not affect the rights of Lee, the holder of the mortgage notes. The defendants, Packard et als., in partitioning the property among themselves and making partial payments, could not limit the operation of the mortgage upon the whole, because the mortgage was an indivisible obligation.

Lee v. Packard et al., 397.

10. There is no force in the objection that the mortgage perempted for want of reinscription within ten years. Neither inscription, nor reinscription, is necessary, so far as the parties to the mortgage or their heirs are concerned.

Seyburn v. Deyris, 483.

11. The property mortgaged was community, and no distribution thereof among the heirs and surviving widow (whose rights are only residuary) can defeat the mortgage given by the deceased to secure a community debt.

Ibid.

12. Where Harwell sold to Mathews a plantation and slaves, who executed certain mortgage notes in favor of said Harwell or order, and subsequently mortgaged said property to Hall, Rodd & Putnam, to secure a debt due them, and then retransferred the property to Harwell, his vendor, who, as a part of the consideration of the retrocession to him, assumed to pay the notes executed by Mathews for the price of the first sale and transferred to third parties by Harwell—two of which notes were redeemed by said Harwell and transferred to Perret, these two notes were extinguished on their return to the possession of Harwell, after he had assumed their payment in the contract with Mathews, by which he repurchased the plantation for which the notes had been given. If conceded that Harwell could reissue the notes, he could not have revived the mortgage by this reissuing. Mortgages are not subject to the rules of the commercial law by which the rights and obligations of parties to commercial paper are fixed.

Hall et al. v. Chacéré et al., 493.

MORTGAGES—Continued.

13. The intervenor was the holder of notes secured by a mortgage importing a confession of judgment and containing the pact *de non alienando*, which authorized him to pursue the mortgaged property in the hands of the third possessor, and the latter, when he enjoined him in so doing, assumed the burden of showing that the sale at which he acquired the mortgaged property divested the rights of the mortgagee thereon. *Dupre v. Thompson*, 503.
14. The allegation that Parks never owned the land in question, and therefore that the mortgage never took effect upon it, works fatally against the defendant, who raised this objection. If Parks, the author of defendant's title, never owned the land, it follows that defendant does not own it and can not be injured by this suit. Repudiating the title of Parks, he repudiates his own, and puts himself out of court. *Pipes v. Nosworthy*, 557.
15. It has never been held that, to make a valid inscription of a conventional mortgage, an entire copy of the authentic act in which it is granted should be spread upon the public record. The object of registration is public notice, with reasonable certainty, of the substantial particulars of the mortgage; and when this is done the purpose of the law is satisfied. *Poutz v. Reggio et al.*, 637.
16. The reinscription on the fourth of December, 1869, of a mortgage given in 1844, reinstated the inscription thereof, to take effect from the date of its inscription; and as this reinscription took place anterior to the plaintiff's judgment, it follows that when the mortgaged property was sold under that judgment, it was first subject to the payment of the mortgage debt. *Ibid.*
17. Where the suit is brought on a mortgage note against the drawers thereof and the indorser who transferred it to plaintiff, and to enforce the plaintiff's hypothecary action against the property mortgaged, which is in the hands of third persons, the defendants in this case, and it appears that, before the act of mortgage was recorded in the mortgage records of the parish, the purchaser against whom the mortgage existed, exchanged the property for another with D, who was a witness to the original act of sale, and whom defendants have called in warranty: Held—That D being a witness to the act of mortgage was not a third person in the sense in which the terms are used in articles 3342, 3343, C. C. Besides, it appears that the mortgage was recorded long before the property was acquired by defendants.

McDaniel v. Stoval, 495.

SEE REGISTRY.

SEE BILLS AND PROMISSORY NOTES, No. 10—*Hoyle v. Casabat*, 438.

SEE PRESCRIPTION, No. 16—*Seyburn v. Deyris*, 483.

SEE COMMUNITY, No. 3—*Lemoine v. Powers*, 514.

SEE TUTOR, No. 14—*Neilson v. Neilson*, 528.

NEW TRIAL.

1. A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws." This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned. *Adams v. Webster*, 113.
2. Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties. *Ibid.*
3. This court is not authorized to refer to the reasoning of the judge *a quo* for the facts. Errors of law in a motion for a new trial can be reviewed here, but not the facts. *State v. Socha*, 417.

SEE JURIES AND JURORS, No. 6—*Halliday v. Lanata*, 373.

NEGLIGENCE.

SEE DAMAGES, No. 4—*Avegno v. Hart*, 235.

SEE DEPOSIT, Nos. 7, 8—*Levy v. Pike*, 630.

NEW ORLEANS.

1. An ordinance of the City Council of New Orleans can not be questioned with regard to its being in contravention of an article of the constitution. The question with reference to the validity of its ordinances is to be tested by the sanction which it has from the Legislature to perform such acts, and in such cases the point to be determined is not whether any particular ordinance is contrary to the constitution, but whether it is permitted by an act of the Legislature. The question would then arise whether the law of the Legislature under which the Council acted was constitutional or not.
City of New Orleans v. Crescent Mutual Insurance Company, 390.
2. The city of New Orleans is not bound to indemnify its citizens for any loss by fire occasioned by the negligence of the fire department. It can not be looked upon as an insurer against such losses. There is no contract, express or implied, between the citizens and the city of New Orleans to indemnify them for any loss which may occur to them by reason of the burning down of their houses, except in cases specially provided by law. The Firemen's Charitable Association has always been a voluntary one, its members are not paid, and the \$126,000 per annum, allowed to them out of the city treasury, are only a subsidy, to enable the association to carry out its objects. *Yule v. city of New Orleans*, 394.

OBLIGATIONS.

1. A party for whom a building is erected is not responsible for materials furnished to the contractor, if said party has not been notified of any claim against the contractor before payment according to the contract, and a detailed bill recorded according to law. *State ex rel. Deblieux v. Recorder of Mortgages*, 61.
2. Where the liability for interest coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release for the bonds includes the liability for the coupons.
State v. North Louisiana and Texas Railroad Company, 65.
3. It is no defense to a suit to plead that the plaintiff had said to the defendant that he would discontinue his suit if some other creditor would do the same. Such a promise would neither discharge the debt nor bar the action, because an agreement without consideration is not obligatory.
Broadbus et al. v. Nolley et al., 184.
4. The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceeding or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession.
Ball et al. v. Estate of Owen, 195.
5. A release in a case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety, defendant on the bond. As a public officer, the sheriff has not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation.
Urquhart v. Carvin, 218.
6. Where the occasion of the discharge of the plaintiff was a quarrel between said plaintiff and defendant commenced by defendant, during which insulting expressions were used by both: Held—That, as the employer was in fault, he should not be permitted to discharge his employe without paying him for the whole term for which he was employed.
Leche v. Claverie, 308.
7. There is no reason why the purchasers of property should not legally bind themselves *in solido* for the payment of the price; if the act of sale does not stipulate solidarity, and the notes do, this is sufficient. Parties may bind themselves as they see fit, and, as they bind themselves, so must they be held.
Gantt v. Eaton et al., 507.
8. Where Elder, one of the defendants, had been cited as a member of the commercial firm of Walters & Elder, in a suit on certain

OBLIGATIONS—Continued.

drafts, and it was alleged and proved, in defense, that said drafts had been given out of the usual course of the partnership business, without any authority, and not on account of the partnership, but where it was also proved that Elder had signed the drafts: Held—That he can not deny *his* authority to make the drafts, and that he is personally responsible for the amount thereof. The firm was sued, but evidence was received without objection which established his personal liability. He is bound by this proof.

Louisiana Mutual Insurance Company v. Walters et al., 560.

9. The objection that there was no notice of dishonor is not valid. The drawer had no funds in the hands of the drawee, and long after the drafts were due, and with the knowledge that they had not been protested, he frequently acknowledged his liability thereon and promised to pay them. *Ibid.*
10. There is no force in the position that Elder gave the drafts for a balance on the compromise of a debt due by the estate of one Pomroy. As the representative of the estate, he could not bind it by drawing drafts, but he bound himself. *Ibid.*
11. Where promissory notes, prescribed on their face, represented the legal obligations of the defendant's father for borrowed money, and the defendant gave his own notes therefor, it was not a *nudum pactum*; there was a valid consideration. The son had the right, by natural mandate, to pay his father's debt, or to promise to pay it, and bind himself unconditionally, as he did. Let him be bound as he saw fit to bind himself. *Matthews v. Williams*, 585.

SEE APPEAL, Nos. 45, 46—*State ex rel. Lacroix v. Judge Fifth District Court, parish of Orleans*, 664.

OFFICE AND OFFICER.

1. Where it was contended that a membership of the board of returning officers was not an office within the contemplation of the law, and therefore that the suit should not be brought under the intrusion act: Held—That the members of the board are designated as officers in the act itself creating it, and that they come within the legal definition of the word. *State v. Wharton et al.*, 2.
2. Where two sets of officers claim to be the legal board of returning officers, it is difficult to conceive why this is not a judicial question. The Governor is not vested with the extraordinary discretion to determine who are the returning officers under the law. *Ibid.*
3. The extrusion and exclusion of Bovee, the Secretary of State *de jure*, from the office by the Governor, did not and could not vest in said Governor the control of the office with the right to put in and put out the occupants thereof at his pleasure. There was no vacancy in the office of Secretary of State—Bovee, the incumbent

OFFICE AND OFFICER—Continued.

de jure, who was only excluded or suspended, and whose office was in the meanwhile filled by Herron, the Secretary of State *de facto*; and yet Wharton was appointed Secretary of State without reference to any removal or vacancy. The commission is without effect. *Ibid.*

4. Wharton, not being legally commissioned Secretary of State, could not as such be *ex officio* a member of the returning board. There is no evidence that he was elected member of the board, and it is not satisfactorily shown that he did take the required oath as a member. *Ibid.*

5. Hatch and Da Ponte were not legally elected members of the returning board. The law provides that "in case of any vacancy by death, resignation or otherwise by either of the board, then the vacancy shall be filled by the residue of the board of returning officers." Warmoth, Lynch and Herron were the residue, of whom two, Lynch and Herron, voted for Longstreet and Hawkins, and Warmoth voted for Hatch and Da Ponte. *Ibid.*

6. Where a suit is by a stockholder of a company to compel the officers to permit him to examine the books of the company, and there is no amount in dispute which could give the court jurisdiction, the appeal will be dismissed.

State ex rel. Newgass v. Friedlander, President, 43.

7. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in executive discretion can not be controlled in its exercise by any other branch of the government. *State v. Doherty, 119.*

8. The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former. *Ibid.*

9. The fifty-fourth section of the act of 1870, No. 100, relating to elections, repeals section 1430 of the Revised Statutes, being section No. 53 of the act of March 15, 1855, prescribing the mode of contesting elections, and the party commissioned under the provisions of said act of 1870 is *prima facie* entitled to the office he claims. *Hughes v. Pipkin, 127.*

10. Police juries are not prohibited from appointing a district attorney *pro tempore* after the lapse of the thirty days mentioned in the statute creating that office. But in that event, the statute confers the same power on the parish judges, and the party that first exercises the power exhausts it. The purpose of the law is to guard against the probability of a vacancy.

State ex rel. Gorham v. Montgomery, 13

OFFICE AND OFFICER—Continued.

11. A police jury is not a legislative body, and its members are not legislators who become *functi officio* with the expiration of the terms for which they are elected or appointed, but can lawfully administer the powers confided to them till their successors are elected and qualified. Revised Statutes of 1870, sec. 2608. *Ibid.*
12. The term of office of the District Attorney is four years, and the District Attorney *pro tem.* holds office for the same period. Revised Statutes of 1870, section 1178. *Ibid.*
13. A police juryman is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office. *Ibid.*
14. Where the Auditor had no authority to draw the warrants he issued, the fact of his drawing them would create no debt against the State, and if issued with the intention of defrauding the State, the Treasurer is not bound to pay them, simply because they may happen to be in the hands of an innocent holder.
State ex rel. Strauss v. Dubuclet, 161.
15. Something more than the genuineness of the Auditor's signature and the lawfulness of the issue is required to protect the holder of State warrants, innocent though he may be. Not being commercial paper, they can be transferred only by the indorsement of the parties in whose favor they were issued. The genuineness of that indorsement must be proved. *Ibid.*
16. The State law of January 13, 1873, merely provides a more speedy remedy for the settlement of contests for judicial offices. It is not violative of section 1 of article 14 of the Constitution of the United States. *State ex rel. Morgan v. Kennard, 238.*
17. Should it even be admitted that the law authorizes the suit in the name alone of the party claiming an office, the fact that the State has joined with him in his demand, advocated by private counsel, does not invalidate the proceedings. *Utile per inutile non vitiatur. Ibid.*
18. The Warmoth commissions that were issued before the general election returns were reported and promulgated by the returning officers of the State, are null and void. *Kemp v. Ellis, 253.*
19. The court will take judicial cognizance of that irregularity which renders the issuing of a commission null and void, as having been done in contravention of positive law. *Ibid.*
20. A commission issued by the Governor must be recognized as having legal force, when it bears *prima facie* evidence of genuineness and validity, and nothing to the contrary is shown. *Ibid.*

OFFICE AND OFFICER—Continued.

21. Under the intrusion into office act, it does not appear that authority was conferred upon the courts to go beyond an investigation of the titles set up by the contestants for the office in controversy.
Collin v. Knoblock, 263.
22. A review of all the cases adjudicated by this court under the intrusion act will show, that, in every instance, not one will be found which depended for its solution upon the inquiry as to which of the contestants obtained the larger number of votes. *Ibid.*
23. The adjustment and compilation of election returns, determining the number of legal and illegal votes cast for each candidate, declaring the result of an election and furnishing the successful candidate with the proper certificate, in short superintending and controlling all the details of an election, belong properly to the political department of the government. *Ibid.*
24. It is only under the statutory provision of 1855, that courts can proceed, in relation to parish offices, and through the agency of juries, to supervise the counting of votes, correct calculations, purge the polls of illegal votes, ascertain and establish majorities. It is confined to cases where no commissions have issued. *Ibid.*
25. The subject matter of proceedings under the intrusion act is widely different from that of the statute of 1855. In cases under the intrusion law, courts can not go beyond commissions legally issued. *Ibid.*
26. No authority is delegated to the judiciary under the intrusion act, to discuss, modify or abolish the official returns of the regular State returning officers. Such a right can not be assumed as an implied power. *Ibid.*
27. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Ibid.*
28. The defendant having been returned by the legal returning board of the State as elected judge of the Fourth District Court of New Orleans, and upon that return the Acting Governor having issued a commission to him according to law, it can not be said that one holding an office under such a commission has intruded into, or unlawfully holds the office. *State ex rel. Bonner v. Lynch*, 267.
29. No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board. *Ibid.*
30. The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact. *Ibid.*

OFFICE AND OFFICER—Continued.

31. Where the State Assessors have delivered to the Auditor the assessment roll and received in full their compensation for their services, the contract between them and the State for making the assessment is completely executed. The obligation of the State to pay them is discharged, and it can not afterwards be revived by any use the Auditor might make of said roll.

State ex rel. Board of Assessors v. Graham, 309.

32. Where, on the fourth of April, 1870, Campbell was elected by the Council of the city of New Orleans, recorder of the Sixth District, the term of his appointment being for two years, and expiring, therefore, on the fourth of April, 1872, and where Michel was appointed in his place, by the Governor, on the twentieth of September, 1872, and on the twenty-fourth of September, 1872, the Council again elected Campbell: Held—That, in a legal sense, the office was vacant on the fourth of April, 1872, and Campbell was only a tenant thereof at the will of the appointing power, and that, under the circumstances of the case, the appointing power was vested in the Governor, by the 1577th section of the R. S., and not in the Council of the city of New Orleans. The appointment being made by the Governor, there was no vacancy, and the subsequent election by the Council of another person, was the filling of a place which was not empty.

State ex rel. Michel v. Campbell, 340.

33. This is a controversy for the office of sheriff of the parish of Pointe Coupee. The suit is brought in plaintiff's own name. He mistook his remedy. The proceeding should have been under the "Intrusion Act." It was not authorized by act No. 41, of the acts of 1873.

Breux v. Lejenne, 364.

34. This court does not recognize the right of the Attorney General, whose term of office is about expiring, to make an agreement so as to preclude his successor from taking an appeal and otherwise discharging his duty to the State.

State ex rel. Nixon v. Graham, 433.

35. An Attorney General who palpably neglects his duty, and who abandons the interest of the State which he was charged to protect and to defend, has no authority to make contracts binding on his successor for a like dereliction of duty.

Ibid.

36. The Attorney General is not the State, but only its counsel. His agreement to acquiesce in a judgment is not the acquiescence of the State, nor does it bind a succeeding Attorney General not to take an appeal where the time for appealing has not elapsed.

Ibid.

37. There can not be, at the same time and in the same State, two valid State governments, with two sets of officers.

State v. McFarland, 547.

OFFICE AND OFFICER—Continued.

38. Where certain persons, to wit: Morrison and Pickens, pretended, the one as clerk and the other as sheriff of the parish of Caddo, to hold their offices and to exercise the functions thereof under what they called the "McEnery government," in opposition to the authority of the United States and the laws and decisions of the courts of this State: Held—That it would seem to be absurd to require an argument to show that parties occupying such positions can not be regarded as *de facto* officers of the government whose authority they contemn. *Ibid.*
39. No. 41 of the acts of the Legislature, session of 1873, forbids persons occupying the position therein described from performing any official act, and also prohibits all officers of the State from recognizing them or giving effect to their acts. "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." C. C. art. 12. *Ibid.*
40. Every official act of Morrison and Pickens is, therefore, null and void, if they be in the category of persons declared to be usurpers in the first section of act No. 41 of 1873, and there is no doubt that they are in said category. *Ibid.*
41. They do not hold office by virtue of any title. They never were declared elected by the Board of Returning Officers at the general election of November, 1872, neither have they been legally commissioned. The documents called commissions, which they hold, purporting to have been issued on the fourth of December, 1872, are absolute nullities, having been issued in violation of law. *Ibid.*
42. No one claiming an office by election in November, 1872, could have been commissioned except by acting Governor Pinchback or by Governor Kellogg, inasmuch as Governor Warmoth was suspended by being impeached by the House of Representatives before the promulgation of the returns of the election by the Returning Board, and his trial was discontinued in consequence only of the expiration of his term of office. *Ibid.*
43. No one shall exercise the functions of an elective office by virtue of an election unless he has been declared elected according to existing laws; and in cases where the law requires the officers to be commissioned, until such commissions shall have been issued. Neither of these prerequisites was observed in this case. *Ibid.*
44. The acts of Morrison and Pickens in assuming to act as the sheriff and clerk of Caddo after the promulgation of the law aforesaid, were in flagrant violation and contravention of its statutory provisions. Such acts are crimes, and consequently can have no legal effect. Those who themselves have violated the law by recognizing such pretended officers, must suffer the consequences of their disobedience. *Ibid.*

OFFICE AND OFFICER—Continued.

45. The pretended official acts of Morrison and Pickens are nullities, and therefore the bond which is the basis of this suit, as well as the proceedings had in the case while Morrison and Pickens were pretending to act as clerk and sheriff, are null and void. *Ibid.*

SEE LAWS AND STATUTES, No. 21—*Banker v. Durand*, 511.

SEE LAWS, No. 3—*State ex rel. Richardson v. Graham*, 73.

SEE GOVERNOR, No. 12—*State ex rel. Dayries v. Yoist*, 396.

PLEADINGS.

1. Where judgment *in solido* being rendered against Wallace & Choppin with vendor's privilege on a certain lot of machinery sequestered in the hands of said firm, but released on bond, and after release sold to Choppin & White, successors to the former, an appeal was granted to Wallace & Choppin and no bond was given by said firm, but by Choppin alone for a suspensive appeal; and pending the appeal, the parties who had obtained judgment against Wallace & Choppin issued execution and seized the property released on bond as aforesaid, which execution was enjoined by Choppin & White: Held—That in answer to the injunction suit, no averment or proof of simulation having been made, the party in possession under a title could not be proceeded against in this indirect manner. *Choppin & White v. Blanc & Legendre*, 35.
2. In this case the defendant resisted the payment of articles of furniture which she admitted to have bought, on the ground that they had been sold, delivered and put up by plaintiffs' father, under whom they claimed, for the express purpose of enabling her to fit up and keep a house of prostitution, which transaction she alleged to be reprobated by law, contrary to good morals and therefore of a nature not to be enforced by the court: Held—That the defendant could not be permitted to avoid the payment of a debt by pleading her own infamy, for reasons assigned in a similar case lately decided—*Hubbard v. Moore*, 24 An. p. 591.
Sampson Brothers v. Kate Townsend, 78.
3. Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation: Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it. *Adams v. Webster*, 117.
4. Under sections 2595, 2605, R. S., relative to contested elections and the whole tenor of the intrusion law, defendant in the court below, and relator here on application for a mandamus, could waive the delay for answering and have a day designated for trial

PLEADINGS—Continued.

without waiting until issue was joined by said answer. Whether the nature of the defense developed in the answer when filed would have authorized a continuance on behalf of the plaintiff is not a question in this case. If the plaintiff is debarred from asking for a jury to be summoned and for a continuance to that effect, it is by his own fault. There was no legal and valid reason for continuing the case as was done, and the plaintiff had no right to a trial by jury as was accorded to him, inasmuch as he did not ask for one in his petition and procured the discharge of a jury that was present, to whose sufficiency and competency as jurors no objection was made, and by whom the defendant in the court below and relator here expressed a willingness to have his case tried immediately. Plaintiff's subsequent application for a jury was obviously for delay. The law makes this class of cases summary in form of proceeding. For these reasons the mandamus prayed for is made peremptory, and the judge *a quo* is ordered to set down relator's case for trial by preference over all other cases and without a jury on the second day of the regular term of his court, April 8, 1873, and to have notice thereof immediately given to the parties.

State ex rel. Pintado v. Judge Fifteenth Judicial District, 149.

5. The plea of payment admits the existence of the debt, whose continuance will be presumed unless the defendant makes good his plea.

Landry v. Delas et al., 181.

6. It is no defense to a suit to plead that the plaintiff had said to the defendant that he would discontinue his suit if some other creditor would do the same. Such a promise would neither discharge the debt nor bar the action, because an agreement without consideration is not obligatory.

Broadbus et al. v. Nolley et al., 184.

7. Where in a suit to erase the mortgage of a third party, said party alleged that the mortgaged property had never been individually owned by the debtor of the plaintiffs, and that, even if it had been the property of said debtor, which was expressly denied, the mortgage was binding and operative, and that no valid reason existed in law to have it canceled: Held—That the two pleas were not contradictory, and that the judge *a quo* erred in ruling defendant to elect between them, because it was competent for the party to prove that the property seized not belonging to the debtor of the plaintiffs, they had no right or interest to inquire into the validity of the mortgage resting on it; and because it was also competent for said third party to establish at the same time that the mortgage in his favor was valid.

Northern Bank of Kentucky v. Police Jury of Pointe Coupee, 185.

PLEADINGS—Continued.

8. Where the plea of prescription is filed in this court, justice requires that the case shall be remanded, at the prayer of the plaintiff, in order that he may have an opportunity of introducing evidence to interrupt the prescription. *Taylor v. Woodward et al.*, 212.
9. An intervention can not be sustained where the demand is not incidental to the main action and where the intervenor neither joins the plaintiff in claiming the same thing, or any thing connected with it, nor unites with the defendant in resisting the claim of the plaintiff, nor claims a privilege on the proceeds of any thing which has been sold, or pretends to be the owner of the thing which has been seized. *Moreau v. Moreau*, 214.
10. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. *Ibid.*
11. Where the demand of an intervenor does not grow out of the principal action and is not specially permitted by law, it must be dismissed. *Ibid.*
12. Where the rights of the plaintiff had neither been ascertained, nor could be ascertained until a settlement of his mother's succession had been had, he must prove this settlement, and then sue for a partition. *Ibid.*
13. An injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued. *Dupre v. Swafford*, 222.
14. Where it was pleaded that an injunction ought to be dissolved, because the party applying for it as tutrix set forth in her petition grounds which could have been urged in the defense to a petitory action against her individually: Held—That the plea is not valid. *Ibid.*
15. Where an exception to the suit was filed on the ground that the heir had been put in possession of the property and the administratrix could not be sued, and where, on said plea, the exception as to the administratrix was sustained, and the case was tried as to the heir: Held—That the suit should have been dismissed. *Martin v. Cannon*, 225.
16. A party should not be listened to, when urging technical irregularities in the proceedings to which he was himself a party, in order that he should enrich himself at the expense of others. *State ex rel. Bach v. Louisiana Levee Company*, 228.
17. Where the defendant was sued for two mortgage notes left with him on deposit, and required to restore them or pay the full amount thereof: Held—That defendant disclaiming any ownership of said notes and having no personal interest in them, has no defense to set up for himself, and has no right to plead one for a

PLEADINGS—Continued.

third party and ask the court to pass upon a question that would not be binding if decided for or against that person.

Ducros v. Gottschalk, 233.

18. The plaintiff having alleged a final settlement, can not go behind it and demand the investigation and adjustment of the affairs of the partnership. Besides, it could not be done in this suit, which is for a specific sum.

Job v. Heuer, 279.

19. Where the allegations and the prayer of the petition and the evidence adduced make it clear that the action is predicated upon a contract, the plaintiff can not recover on a *quantum meruit*.

Mazureau & Hennen v. Morgan, 281.

20. Where the plaintiff prayed for a mandamus to compel the Auditor to issue to him warrants on the State Treasury for compensation for mortgages recorded by him under the section 67 of act 42 of 1871, at the rate of \$1 50 per each mortgage, in accordance with the roll which he had furnished to the Auditor, and which is in the Auditor's possession: Held—That there is nothing in the record showing that the amount claimed exceeds five hundred dollars and vests jurisdiction in this court. It may be above or below that sum. The jurisdiction of the court must be apparent from the pleadings. It can not be guessed at.

State ex. Recorder of Mortgages v. Clinton, 285.

21. Where the exception was, that plaintiff, having claimed in her first petition only one-half of the commission allowed by law to executors, could not, in a supplemental one, claim the whole commission: Held—That she had the right to amend her pleadings, and that the exception could not be maintained.

Hale v. Salter, 320.

22. Where the plaintiff in execution contended that the builder's privilege was lost by the sale of the property in mass: Held—That said plaintiff, who proceeded with the sale in block, notwithstanding the third opponent's application for a separate appraisal, ought not to be heard setting up such a defense. He ought not to benefit by his own wrong.

City of Baltimore v. Parlange, 335.

23. The third opponent, having claimed part of the proceeds, has no right to demand that the sale be treated as an absolute nullity. Besides, it could only be set aside in a direct action.

Ibid.

24. Where the plaintiff, in a suit against D, seized certain bales of cotton by attachment, in the hands of A, to whom the cotton had been shipped, and A intervened, and alleged he had privilege on said cotton for advances to make it and for charges paid on the same, which was in his possession, and D bonded the property

PLEADINGS—Continued.

after the intervention of A: Held—That the intervention and third opposition could not be excepted to as premature. The intervention could not be considered as dismissed by the bonding. The bond remained in lieu of the property seized and released.

Cass & Dowling v. Rouark, 353.

25. The intervention could only be made while the suit was pending; and there is no good reason why the third opposition should not be made at the same time, in order that the relative rank of the contesting creditors should be settled in one suit. *Ibid.*

26. The plea that an agent had no right to stipulate the solidarity of the obligation sued on, is a matter of special defense, which should have been set up in defendant's answer. It can not be urged in error to a judgment rendered and confirmed by default.

Gantt v. Eaton et al., 507.

27. Nothing can be assigned as an error of law which could have been cured by evidence legally given at the trial.

Succession of Bailey, 580.

28. An assignment of errors in this court can not cure the omission of the appellants to make opposition and present regularly the issues of fact which they desire adjudicated. *Ibid.*

29. The grounds for opposing the judgment placed on the tablean are such as should have been presented before its rendition, and can not be urged in this proceeding. If the heirs are injured by the failure of the administrators to set up those grounds, there is a remedy at the proper time and before the proper tribunal. Their prayer to amend the judgment can not be heard, because they are appellees.

Succession of Hart, 583.

30. Where there is a discrepancy between the allegation and the document made part of the petition, the latter controls.

Matthews v. Williams, 585.

31. Where the plaintiff brought suit in his own name on a promissory note drawn payable to his wife or bearer, and which was executed by defendant for the price of certain lands, purchased by him from the wife, the same being her paraphernal property, and where it was contended on the part of the defendant that the facts in the case showed that the plaintiff did not have the administration of the wife's property; and it was contended, on the other part, that this was not a real action, and that by article 107 of the Code of Practice the plaintiff in this case had the right to sue for the debt due his wife: Held—That the ground assumed by plaintiff is correct, and that the fact that the husband brought the suit would seem to imply that he was administering the wife's paraphernal property.

Morton v. Copeland, 592.

PLEADINGS—Continued.

32. The defense set up that there is defect in the title to the land forming the consideration of the note sued upon can not be admitted, inasmuch as defendant does not allege in his answer, or show by testimony, that he has ever been threatened with eviction, or that he has ever been disturbed in his possession. *Ibid.*

SEE MORTGAGE, No. 14—*Pipes v. Norsworthy*, 557.

SEE ACTION—*Chavanne v. Frizola*, 76.

SEE EVIDENCE, Nos. 10, 11.

SEE COMPENSATION, No. 1—*Adams v. Webster*, 117.

SEE INJUNCTION, No. 7—*Lee v. Packard*, 397.

SEE JURISDICTION, No. 8—*Thibodeaux v. Voorhies*, 478.

PRACTICE.

1. It can not be contended, on the part of defendant, that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent, or had gone out of the parish, it was necessary to appoint an attorney upon whom the service of the notice of judgment should have been made.

Holbrook v. Bronson, 51.

2. The appointment of persons to represent parties to a suit should be made with caution and in cases clearly designated. *Ibid.*
3. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix, were not absolute nullities and can not be attacked collaterally.

Succession of Pinnijer, 53.

4. The title to property can not be attacked collaterally, and where a judgment creditor seizes property as belonging to his judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation.

Pierce v. Clark and Sheriff, 111.

5. A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws." This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned.

Adams v. Webster, 113.

6. Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties. *Ibid.*

PRACTICE—Continued.

7. Where a motion as to the disqualifications of a grand juror, which rested on questions of facts, was overruled, and no bill of exceptions taken: Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes. *State v. Branch*, 115.
8. Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where, on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto: Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary. *Ibid.*
9. Where a judgment by default was entered before the delay required by law had expired, it will not be maintained as valid on the ground that it was not made final until after the usual delays and that the defendant, having thereby suffered no injury, can not complain. *Hart & Co. v. Nixon & Co.*, 133.
10. The words "ordinary course of practice" mean that the course which is positively commanded by the law shall be pursued. *Ibid.*
11. There is no difference between entering a default a day too soon and confirming a default a day too soon. One delay is as imperative as the other. *Ibid.*
12. There is no issue joined when the judgment by default has been improperly entered, and the judgment in confirmation has nothing to rest upon. *Ibid.*
13. There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court. *Blair & Co. v. Taylor et al.*, 144.
14. A mortgage creditor has no right to enjoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a higher rank, or a preference over him. *Wells v. Wells*, 194.
15. Where creditors, who were by judgment entitled to be paid by preference intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so amended as to allow them twenty per cent. damages on their

PRACTICE—Continued.

claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff, who, by injoining, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted. *Ibid.*

16. The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceeding or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession.

Ball et al. v. Estate of Sharpley Owen, 195.

17. This court can go behind the judgment of the court *a qua* to see when the obligations sued on arose between the parties.

Robert v. Coco, 199

18. "If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus." C. P. art. 156. *Stafford v. Stafford*, 223.

19. Where the defendant, after pleading to the merits, made a reconventional demand, and the judge refused to fix the cause for trial unless the defendant should give security for costs: Held—That there is no known law or practice which could justify his conduct, and that none had been referred to by said judge.

State ex rel. Nelson v. Judge of the Sixth District Court, parish of Orleans, 227.

20. The proceeding by rule is not new under the laws of this State, and whenever the Legislature authorizes it, that summary form of remedy may be adopted by litigants, and the want of citation or notice can not be pleaded by defendant. The delay allowed to answer would undoubtedly be extended by the court, on proper application, if insufficient.

State ex rel. Morgan v. Kennard, 238.

21. The penalty for not producing books and papers in obedience to a *subpena duces tecum*, is not imprisonment for contempt. The consequence of the disobedience is, that the party who has obtained the subpoena has the right to ask that the facts which he states in his affidavit for the subpoena be taken as proved.

Columbia Fire Company No. 5 v. Purcell, 283.

22. Where the books called for were produced on the day of the trial, and the defendant did not then move for a continuance in order to allow him time to examine them, but simply objected to going to trial: Held—That this was not sufficient. He should at least

PRACTICE—Continued.

have suggested to the court that he was deprived of some right, or that an examination of the books was necessary to enable him to make out his case. *Ibid.*

23. It is a rule of court, long since established, that unless personal service has been made upon a witness, no attachment to compel his attendance will be granted. *State v. Allemand*, 525.

24. No postponement or continuance will be granted unless accompanied by proof of due diligence. *Ibid.*

25. Where the administrator and the opponent to the tableau of distribution by said administrator have filed a written agreement to have the judgment dismissing the opposition reversed, and to reinstate the opposition, and to remand the case to be tried on its merits: Held—That this can not be done without the consent of all the parties interested, several of whom are not before the court, and that the case must be continued to have the creditors on the tableau cited according to law.

Succession of Romero, 534.

26. An intervenor is entitled to the delay necessary for service of citation and putting the intervention at issue.

Sandel v. Douglas, 564.

SEE CITATION, No. 3—*Bell v. Short*, 312.

PAYMENT.

1. Where a commercial firm, the payees of two promissory notes, due respectively in 1862 and 1863, instituted in April, 1870, suit against the indorser thereof, and where, on the payment thereof being established by notarial act, plaintiffs attempted to prove that it was made in Confederate notes, and contended that said payment was in violation of the non-intercourse laws, having been made at Shreveport, within the Confederate military lines, to one of the plaintiffs, who was a resident of New Orleans, then within the Federal lines, and whose authority, therefore, to represent the firm as its agent ceased to exist: Held—That whatever might be said of the acts of the said party in going through the prohibited lines, and its legal effects upon any contracts of his own or his firm, said firm, or any one of its members, can not now invoke the illegality of the said payment, or enforce a second payment. They can not be heard to urge their own unlawful conduct to their own benefit. The payment under such circumstances must be held binding upon both plaintiffs. *Rogers et al. v. Gibbs*, 563.

SEE JUDGMENT, No. 22—*Winston v. Nunez*, 476.

No. 36—*Guidry v. Jeanneaud*, 634.

PARTITION.

SEE SUCCESSION, No. 6—*Sevier v. Sargent*, 220.

SEE MARRIAGE, No. 9—*Lee v. Packard*, 397.

PROMISSORY NOTES.

SEE BILLS AND PROMISSORY NOTES.

PARTNERSHIP.

1. The prescription of three years set up against a suit for settlement of the affairs of a partnership is not applicable when no settlement of its business and no adjustment of the liabilities of the copartners among themselves have taken place.

Benoist et al. v. Markey et al., 59.

2. In the case of a dormant or secret partner, although credit is manifestly given only to the ostensible partner, no other party being known, yet it is not deemed an exclusive credit, but is binding upon all for whom the partner acts, if done in their business and for their benefit.

Boudreaux v. Martinez et al., 167.

3. The creditor is not affected by the State of affairs between the partners *inter se*. A deceit or fraud between them has nothing to do with their obligations towards third persons who are not party to it.

Ibid.

4. The circumstance that a woman is the concubine of her male partner, does not deprive her of an action for the settlement of affairs and a participation in profits derived from capital and labor which she contributed, though much of the property claimed is real estate standing in the copartner's name alone, and had never stood in her's.

Malady v. Malady, 448.

5. The fact of the social relations which Mary B. Caldwell, one of the defendants in this case, has chosen to assume, can not deprive her of what justly belongs to her. She should be allowed to place her capital and industry against the capital and industry of William Malady, her paramour and copartner, and the property purchased during the time they have been living and working together, should be declared property in which they have a joint interest; one-half of it should be decreed to be the property of William Malady, and said half to belong to the community which existed between himself and his lawful wife, Mary Malady.

Ibid.

6. Were it admitted that a partner can shield himself from responsibility by publishing that he will not be responsible for debts contracted by his copartners in the interest of their common venture, still the notice, even if sufficient, must be brought home to the party who contracts on the responsibility of the firm. His telling his partners that he would not be responsible, does not affect the plaintiff, who was not noticed.

Drum v. Hanna et al., 645.

PARTNERSHIP—Continued.

7. Under such circumstances, a copartner, who stood by and saw, without objections, a work done which was necessary for the prosecution of the business in which he was engaged, is bound to pay for it. *Ibid.*

PRESCRIPTION.

1. The prescription of three years set up against a suit for settlement of the affairs of a partnership is not applicable when no settlement of its business and no adjustment of the liabilities of the copartners among themselves have taken place.

Benoist et al. v. Markey et al., 59.

2. Article 613 of the Code of Practice, concerning prescription, clearly refers to a *judgment in a contested suit*, but which has been obtained through fraud, or because the defendant had lost the receipt given by the plaintiff. Article 1994 Civil Code applies to acts made in fraud of creditors. *Fuentes v. Gaines*, 85.

3. The validity of a probated will is immaterial to third parties until they are disturbed under it in the possession of their property, and prescription against them could not begin to run until the cause of action had arisen; nor can prescription run against one in possession. *Ibid.*

4. A judgment of nonsuit based upon the mere failure of a plaintiff to appear, can not be regarded as a voluntary abandonment of the claim. The suit was sufficient to interrupt prescription.

Locke v. Barrow, 118.

5. Where it was contended that two judgments were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed: Held—That the prescription of the judgments was properly interrupted, because citation was served personally within ten years. Whether the application was made in one petition or in two is immaterial. The decree of revival for both judgments was rendered contradictorily with the defendant, who was personally cited within ten years. There is no law requiring this decree arresting prescription to be registered. *Carroll et al. v. Seip et al.*, 141.

6. Where the plea of prescription is filed in this court, justice requires that the case shall be remanded at the prayer of the plaintiff, in order that he may have an opportunity of introducing evidence to interrupt the prescription.

Taylor v. Woodward et al., 212.

7. Where a final judgment was rendered, on the twelfth of April, 1869, against Juilliard, in the case of *Juilliard v. Rogay*, in which Juilliard had caused Rogay to be arrested on the ground of his departing permanently from the State without leaving therein sufficient property to satisfy the demand of his creditor: Held—

PRESCRIPTION—Continued.

That the prescription of one year can not be opposed by the surety on Juilliard's arrest bond against a suit instituted by Rogay on the fourth of December, 1869, to recover damages for his unlawful arrest in November, 1865, because his right of action did not accrue until the final judgment in his favor was rendered. Besides, it is not an action arising *ex delicto*. It is a suit upon a bond. It is an obligation entered into by the signers thereof, and can, therefore, be considered only as an obligation to be prescribed by the laws regulating the prescription of obligations, and not by the laws regulating the prescription of actions for damages arising from the commission of offenses or quasi-offenses.

Rogay v. Juilliard, 305.

8. The action against the sureties of a sheriff for money collected by him and not accounted for to the party entitled to it, is barred by the prescription of two years. Revised Statutes of 1870, section 2316.

Hugh v. Hernandez, 360.

9. The law has not given the summary remedy by rule against sureties on a sheriff's bond, and where the rule was made absolute, and in a subsequent action of nullity, said judgment was set aside on the ground that no citation had been served on the parties, the prescription of two years was not interrupted by the instituting of such a proceeding against the parties.

Ibid.

10. Where the action is to make a telegraph company responsible for loss on goods, resulting from error in a telegraphic message, the prescription of one year does not apply. This action arises *ex contractu*, and not *ex delicto*.

La Grange v. Southwestern Telegraph Company, 383.

11. This action, as its character appears from the petition, is a suit for a tort or trespass; and the defendant is sought to be made liable *in solido* as a co-trespasser with another person, with whose trespass, if committed, he is in no manner connected. If such an action would lie against the defendant, it is certainly barred by the prescription of one year, which is pleaded.

Whitehead v. Dugan, 409.

12. The seizure of A's property under a suit against B, is a quasi offense, and the action based upon an obligation springing from a quasi offense is prescribed by one year.

Lizardi v. New Orleans Canal and Banking Company, 414.

13. Where it was contended that even if the source of the obligation incurred by the defendant be conceded to have been a quasi offense, such as the wrongful attachment of the plaintiff's property, still the prescription should not begin to run until the end of the wrongful act, for until then the amount of the damages done by the continuous attachment could not have been ascertained:

PRESCRIPTION—Continued.

Held—That if there is good reason why the law regulating prescriptions in such cases ought to be as is contended, yet that this court has no right to alter the positive provisions of the code which declares that prescription runs from the date on which the injury or damage was sustained. But it is incumbent upon the party pleading prescription to show what portion of the damages proved occurred anterior to the year preceding the institution of the suit, or in other words, to establish what part of the plaintiff's demand is prescribed. *Ibid.*

14. In fixing the rents due for the plantation seized, the highest estimate which the evidence will permit must be adopted, as the property was tortiously taken from the possession of the plaintiff. *Ibid.*

15. A simple acknowledgment of a debt, when prescription is acquired, is not a renunciation of the prescription. In this case the evidence does not establish a positive promise to pay. At most, it was an offer to compromise by the payment of half, which was not accepted. *Frellsen v. Gantt, 476.*

16. Where a debt was acknowledged in an act of mortgage and not represented by notes, the prescription of ten years is applicable. *Seyburn v. Deyris, 483.*

17. The prescription of ten years was interrupted as to Widow Eugenie Deyris, by the note which she gave on the seventh of April, 1862, for the interest accrued during the years 1860, 1861 and 1862, and inasmuch as subsequently, on the twenty-eighth of February 1868, she waived prescription on this note. *Ibid.*

18. The note signed on the first of January, 1868, by Eugenie Deyris, widow of Henry Penn, Sr., and by one of the heirs, Clara Penn, representing the interest for another year on the mortgage claim, did not amount to a renunciation of prescription by Clara Penn, as to her share of the past instalment of the mortgage debt. That note contains no renunciation by her of the prescription already accrued. *Ibid.*

19. The act of 1853 fixing the prescription of judgments at ten years from their rendition, also provides the only means by which it can be averted, and said prescription, therefore, can only be averted by complying with these requirements.

Succession of Hardy, 489.

20. The plea of prescription, filed by the administrator, can not extend its benefits to the heirs of age and the widow. As to the succession and the minors, it does—their interest being in the succession, and the succession being represented by the administrator, whose duty it is to interpose any legal defense in his power to a suit in which the succession he represents is interested.

Banker v. Durand, 511.

PRESCRIPTION—Continued.

21. The plea of prescription filed in this court by defendant against plaintiffs, who allege the nullity of the judgment he relies upon, is not well taken. The plaintiffs, in pursuit of their rights, finding themselves opposed by what purports to be a superior mortgage to theirs, have the right to attack it and show its nullity.

Kennedy v. Rust, 554.

SEE BANKRUPTCY, No. 3—*Willard v. Brigham*, 600.

SEE JUDGMENT, No. 34—*Winter v. Tounoir et al.*, 611.

SEE WILLS AND TESTAMENTS, No. 15—*Succession of Dubreuil*, 370.

PRIVILEGE AND LIEN.

1. A commercial firm can not satisfy the remainder of their claims of 1866 for moneys and other supplies furnished to an agricultural firm, out of the proceeds of the crop of 1867, to the prejudice of another commercial firm who made all their advances in that year, and in whose possession part of the crop has been put by consignment and under a regular bill of lading before the issuing of a writ of sequestration.

Given, Watts & Co. v. Alexander & Co., 71.

2. The article 3227 of the Civil Code does not give any privilege upon produce sold for cash. A sale for cash means that, when the property is delivered, the money is to be paid, and where not paid after delivery, so long as the property remains in the possession and under the control of the vendee, the vendor's lien remains as between the parties, but the lien does not follow it when it passes into the hands of innocent third parties. Vendors can not complain if they sell for cash and still allow purchasers to take away the goods without paying for the same. The fault being with them, the loss, if any, must be theirs also.

Delgado & Co. v. Wilbur & Co., 82.

3. Where it was alleged in opposition to the claim of a necessitous widow, that the adjudication of a debtor's property to himself, created the vendor's privilege to secure the twelve months bond which he gave: Held—That an adjudication of this character does not create the vendor's privilege, because it does not transfer the ownership of the property, nor change the nature of the title and possession; that it neither satisfies the judgment, nor novates the debt; that it is not strictly a sale, but only a means by which a creditor acquires additional security for his debt.

Succession of Heitzler, 116.

4. Where the vendee was put in possession in Germany of a certain quantity of wine which he had bought in that country and that possession continued across the Atlantic: Held—That the vendor's privilege could not be stretched so far as to extend from the banks

PRIVILEGE AND LIEN—Continued.

of the Rhine to the banks of the Mississippi, and be made to last during a voyage from one continent to the other.

Loeb & Co. v. Blum, 282.

5. A consignee's privilege can not prevail against the seizure made by judgment creditors, if not recorded prior to the seizure.

Ibid.

6. Where it was established that the plaintiff, master of a boat, was authorized by his employer, the captain of the boat, to collect freight bills of a certain amount which he held, with the understanding that said plaintiff accepted said amount of bills in settlement of his wages amounting to four hundred and sixteen dollars and fifteen cents, and advances to his employer amounting to two thousand dollars, and that said employer or the boat would make the amount of the bills good, if they could not be collected, and where it was admitted that plaintiff collected one thousand and thirty-eight dollars and thirty-five cents: Held—That of the sum thus collected there should have been imputed the amount due for the payment of plaintiff's wages, as the privileged claim.

Radowitch v. Siewerd et al., 315.

7. Where it was conceded that there was due to a builder, on his duly registered contract, a certain balance, after deducting partial payments previously made: Held—That for this amount of his judgment, the builder's privilege had effect as against the plaintiff and other mortgage creditors of the defendant in execution.

City of Baltimore v. Parlange, 335.

8. The attorney's fees and damages stipulated in the contract with the builder created no privilege.

Ibid.

9. Where there was a clause in the contract allowing the builder further compensation for extra work done under any alteration of the specifications that might be ordered, and there was no fixed sum or estimate for such extra work: Held—That the registry of the contract gave effect to no privilege to secure this indefinite amount.

Ibid.

10. The vendor's privilege attaches to the improvements put upon lots by the vendee, where the vendor is not opposed by any one entitled to or claiming a special privilege upon the buildings.

Succession of Bouvel, 431.

11. The objection that a widow claiming the benefit of the one thousand dollar reservation has lost her right to it by failing to register her claim as a privilege is without force. This provision for destitute widows and orphans is not to be regarded strictly as a privilege, and the recording of it is not necessary for its preservation. This claim must be paid in preference to all other debts, except for the vendor's privilege and expenses incurred in selling the

PRIVILEGE AND LIEN—Continued.

property, and where it conflicts with the lessor's privilege the latter must yield. *Ibid.*

12. Laborers have their privilege independent of and distinct from that of the furnisher of supplies, and each privilege attaches as against the owner of the crop produced.

Lalanne v. Goodbee, 481.

SEE COMMUNITY, No. 3—*Lemoine v. Powers*, 514.

SEE DEPOSIT, Nos. 3, 4, 5, 6—*Lanoue v. Dumartrait*, 478.

PRINCIPAL AND AGENT.

1. Where a power of attorney is given to an agent "to make checks and draw money out of any bank or banks wherein the same may have been deposited in the name or for account of the principal," the fact that a sufficient amount to meet the check was not deposited when the check was drawn is not a valid defense, and does not authorize the principal to refuse paying it in the hands of a party who had no notice of the prohibition put upon the agent.

Crescent City Bank v. Hernandez, 43.

2. It is better that the immediate employer and principal of an agent should suffer by the imprudence of his employe than that third parties should suffer from those acts of agents which are recognized by the public as valid, because of the confidence reposed in the principal. *Ibid.*

3. Where an agent issues a commercial obligation authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration which has actually accrued to the benefit of his principal, and that, therefore, the principal is bound by it; and third parties who, acting on the presumption, receive such negotiable obligations, are protected against the equities of which they have no notice. *Ibid.*

4. Where a bank, acting as agent for collecting certain drafts, took Confederate money on the ground that there was at the time no other currency to be had in New Orleans or in any other part of the Southern Confederacy: Held—That the bank should have collected the drafts in lawful currency, and that if this was impossible, it should have given notice thereof to the principal, or should show that the collection was in that currency and approved by him.

Waterhouse, Pearl & Co. v. Citizens' Bank of Louisiana, 77.

5. The sale by an agent after the owner had sold the property conferred no title. The power to sell was impliedly revoked by the owner's sale. In this case no damage is shown to have been done to the plaintiffs. They had not paid for the price, and within an hour or two after the agreement to sell to them, they were informed that the property had been previously sold by the owner and for less than they had agreed to give. *Torre v. Thiele*, 418.

PRINCIPAL AND AGENT—Continued.

6. Where the defendant acted merely as an agent and exhibited his authority, neither doing nor saying anything by which he obligated himself to pay the plaintiff any sum whatever, and nothing was mentioned between them as to compensation; but, on the contrary, notice was given to the plaintiff that the services which he had been bespoken to perform, were desired from another person: Held—That whether the plaintiff has or not any legal claim against the principal, it is clear that he has none against the defendant.

Rosenthal v. Myers, 463.

POLICE JURY.

1. Police juries are not prohibited from appointing a district attorney *pro tempore* after the lapse of the thirty days mentioned in the statute creating that office. But in that event the statute confers the same power on the parish judges, and the party that first exercises the power exhausts it. The purpose of the law is to guard against the probability of a vacancy.

State ex rel. Gorham v. Montgomery, 138.

2. A police jury is not a legislative body, and its members are not legislators who become *functi officio* with the expiration of the terms for which they were elected or appointed, but can lawfully administer the powers confided to them till their successors are elected and qualified. Revised Statutes of 1870, sec. 2608. *Ibid.*
3. A police jurymen is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office.

Ibid.

4. When the ordinance of the police jury which is complained of in this case was passed, the revenue law of 1871 was in force, even if such authorization was necessary. The tax imposed by the ordinance was authorized by that law, and having been levied under it, it can not be held that the action of the police jury was illegal.

Jones v. Grady, 586.

5. Police juries are not restricted in their action in regard to licenses exacted by them for the right of selling liquor and retailing spirituous liquors to the amount exacted by the State for the same.

Ibid.

6. Section 2778, Revised Statutes, means that whenever the police jury deems it necessary that the sense of the people should be taken as to the propriety of permitting grog shops to be licensed, a vote may be ordered. But when this shall be deemed necessary, is a matter entirely within the discretion of the police jury.

Ibid.

SEE TAXATION AND TAXES, No. 20—*Maurin v. Smith*, 445.

PROHIBITION.

1. A writ of prohibition will only be issued in aid of the appellate jurisdiction of this court. It is not necessary, where, on the judgment being rendered in the court below, the case can be brought before this court for review, and the question of jurisdiction be decided.

State ex rel. Caballero v. Judge of the Second District Court, parish of Orleans, 381.

PLEDGE.

1. A factor can not secure his individual creditor by pledging the planter's cotton which has been confided to him for sale. That power is not conferred by act No. 150 of the acts of 1868, entitled "An Act to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton presses, wharfingers and others." There is nothing in the statute showing any intention of the legislator to enlarge the powers of factors, or to give them the right to pledge the property confided to them for sale.

Young v. Scott & Cage, 313.

QUASI OFFENSE.

SEE PRESCRIPTION, Nos. 12, 13—*Lizardi v. New Orleans Canal and Banking Company*, 414.

RES JUDICATA.

SEE COURTS, No. 25—*Copley v. Dinkgrave*, 577.

SEE JUDGMENT, No.—*Fuentes v. Gaines*, 85.

No. 21—*Succession of Milton Taylor*, 446.

REGISTRY.

1. The object of registry both of sales and mortgages is notice, and when the recorder registers a private sale, whether he has done so on sufficient proof is immaterial as regards notice to the public; the object of the law is fulfilled, and subsequent purchasers are affected.
2. The failure of the recorder to inscribe with the instrument the proof upon which he admits it to registry does not render the registry null.
3. Where it was contended that two judgments were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed Held—That the prescription of the judgments was properly interrupted, because citation was served personally within ten years. Whether the application was made in one petition or in two is immaterial. The decree of revival for both judgments was rendered contradictorily with the defendant, who was personally cited within ten years. There is no law requiring this decree arresting prescription to be registered.

Carroll et al. v. Seip et al., 141.

REGISTRY—Continued.

4. A judicial mortgage, like any other, must be reinscribed within ten years from the first inscription in order to preserve the rank acquired by said inscription. *Ibid.*

5. Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it: Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract.

Mills v. Sheriff of East Feliciana, 142.

6. The mere recital of an act of mortgage in a subsequent act acknowledging the obligations contained in the first act, does not, as to third parties at least, operate the reinscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription as to the debt, but does not reinscribe the mortgage which secured it.

Blair & Co. v. Taylor et al., 144.

7. There is no law which directs a book to be kept in the parish recorders' offices for the recording of tutors' bonds, and this court is not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of a minor's mortgage, where in the same office are kept the books in which the law directs mortgages to be inscribed.

Fisher v. Tunnard, 179.

8. It has been frequently held that in the country parishes the registry of a mortgage in the conveyance book in which all mortgages and privileges are recorded, is sufficient, if separate books be not kept; but if there be a separate registry of mortgages, the mortgage must be inscribed in it. *Ibid.*

9. Where a wife had obtained a judgment against her husband, under which his property had been sold and purchased by her: Held—That after her purchase the judgment creditors of her husband could seize the same property as his, and that the wife had not the right to injoin the sale thereof, inasmuch as the sale to her was not recorded in the recorder's office.

Nancy Doughty v. Sheriff et al., 290.

10. Where, instead of procuring and recording, according to law, certified copies of judgments as directed by city ordinance No. 1630, administration series, the plaintiff followed the provisions in section 12 of act No. 73 of 1872, by which a special mode was provided for recording the taxes due to the city without any cost to the city: Held—That if the provisions of this act are resorted to in

REGISTRY—Continued.

preparing and inscribing the tax judgments to preserve the lien and mortgage in favor of the city, its provisions in regard to compensation must be enforced. It is only by the terms of this law that the lists or registers prepared by the plaintiff can have effect as a legal inscription. But this inscription was to be made without cost to the city. Outside of this law the said registers or inscriptions of judgments, as made by plaintiff, are without effect. The inscriptions are not made in the books of privileges and mortgages required by the general law on the subject.

Southworth v. City of New Orleans, 333.

SEE PRIVILEGE, No. 11—*Succession of Bouvet*, 431.

SEE DEPOSIT, No. 6—*Lanoue v. Dumartrait*, 478.

SEE JUDGMENT, No. 33—*Winter v. Tounoir et al.*, 611.

SEE MORTGAGE, Nos. 15, 16—*Pouts v. Reggio et al.*, 637.

RECORD.

SEE APPEAL, No. 21—*Coco v. Thieneman et al.*, 236.

SUCCESSION.

1. Where the heirs have been put in possession of the succession of their father and mother by the Probate Court, the succession is terminated. The property passes to the heirs and the debts of the deceased become the debts of the heirs, each being liable for his virile share. The application for administration is too late, and if the appellant be a creditor, his remedy is against the heirs.

Successions of Dunford & Remi, 56.

2. Where it might be true that, technically, a widow had never qualified as administratrix of her husband's succession, yet where she qualified as tutrix to her minor children, she necessarily became administratrix of his succession, and payment to her as such of a debt due to the succession would be valid. *Locke v. Barrow*, 118.
3. Where the creditors of a succession opposed the final account of the administratrix of said succession on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid: Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiae*. The administratrix should not have omitted to place the claim of the opponents on her final account and to provide for its payment, because the process of garnishment had been resorted to against one of the opponents by a third party.

Succession of Neal, 125.

SUCCESSION—Continued.

4. The parish court charged with the duty of settling successions has nothing to do with the partition of property held in indivision where the matter in dispute exceeds five hundred dollars.

Johnson v. Labatt, 143.

5. Where a judgment creditor with special mortgage and vendor's privilege caused a *fi. fa.* to be issued by the district court against the property of a succession, which *fi. fa.* was enjoined by the executor of said succession, and where, whilst the injunction was pending said executor applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction for the purpose of paying the debts of the succession, and the court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ: Held—That the court erred in not granting the order prayed for by the executor. Succession property can not be sold under a *fi. fa.* The executor was in possession of the property when seized, and the probate court had jurisdiction to order the sale. The creditor had a mortgage on the property, but he saw fit to pursue the *via ordinaria*, and having elected that mode of procedure, he could not have been allowed to change it after he had obtained judgment, even if he had attempted to do so, which he has not done. No injury can result to the judgment creditor by authorizing the sale prayed for by the executor if he has a mortgage superior to other creditors.

Succession of Patrick, 154.

6. Where a note for a certain sum of money was found in the succession of the father of the maker's wife, and was alleged to have been given in acknowledgment of an *avancement d'hoirie* to said wife, who subsequently died, leaving minors for her heirs: Held—That said note being given in the individual name of the maker must be considered as his individual debt, and is not subject to collation on the part of the minors in the succession of their grandfather, and that, even admitting said note to have been an acknowledgment of indebtedness by the drawer in the name of his children, a tutor has no right to make such an acknowledgment.

Succession of Landry v. Peray, 183.

7. Where creditors, who were by judgment entitled to be paid by preference, intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so amended as to allow them twenty per cent. damages on their claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No

SUCCESSION—Continued.

act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff who, by injunction, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted.

Wells v. Wells, 194.

8. Where the heirs were put in possession of the property of their ancestor, if the partition between them be defective as a judicial partition, it is certainly valid as a conventional one, all being of age and signing the act. *Sevier et al. v. Sargent et al.*, 220.
9. Where the heirs went into possession and partitioned the property, the succession was wound up, because it ceased to exist. A creditor of the deceased became the creditor of his heirs, each being bound to him for his share of their ancestor's debt. If some of the heirs are not solvent, and the creditor may lose part of his claim, the fault is attributable to himself; he might have required security from the heirs before they obtained actual delivery of the inherited property. *Ibid.*
10. Where the plaintiffs claimed one-half of a certain lot of ground as heirs to their deceased mother, who had an undivided community of interest in said lot, now in possession of defendant: Held—That plaintiffs had no cause of action, inasmuch as it was not shown that the community between the plaintiffs' father and mother had been settled, nor that anything remained after paying the debts thereof, nor that plaintiffs had been put in possession of their mother's estate. *Phelan v. Ax*, 379.
11. Where in a suit instituted for partition by plaintiff against her coheirs, a curator *ad hoc* was appointed, on the prayer of the plaintiff, to one of said heirs who was a minor, the appointment was erroneous. *Malone v. Casey*, 466.
12. Where the heirs neither expressly nor tacitly have accepted unconditionally the succession of their ancestor, but where, on the contrary, on their being sued, they expressly circumscribed their liability, as they had a right to do, to the value of their ancestor's estate, a judgment which, under such circumstances, condemns them personally is erroneous. *Banker v. Durand*, 511.

SEE JUDGMENT, Nos. 30, 31—*Miguez v. Delahoussaye*, 531.

SEE EXECUTOR AND ADMINISTRATOR, Nos. 16, 17, 18, 19—*Succession of Caballero*, 646.

SEE WILLS AND TESTAMENTS, No. 15—*Succession of Manette Dubreuil*, 370.

STAMPS—U. S.

SEE EVIDENCE, Nos. 20, 21—*Pavy v. Bertinot*, 469.

STRAIGHT UNIVERSITY.

SEE CORPORATION, Nos. 3, 4, 5—*State ex rel. Straight University v. Graham*, 440.

SEIZURE AND SEIZURE SALES.

1. The objection that, when the release bond in this case was signed on the first of July, 1868, there was no law authorizing the release on bond of property provisionally seized, is not well taken. It was authorized by the act of the sixth July, 1867. See Revised Statutes of 1870, section 1914. *Lepretre v. Barthet*, 124.
2. As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety. *Ibid.*
3. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond, or release the surety. *Ibid.*
4. A release in a case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety defendant on the bond. As a public officer, the sheriff has not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation. *Urquhart v. Carrin*, 218.
5. An order of seizure and sale should not be enjoined for insufficiency of the evidence upon which it was rendered. The remedy is an appeal. This is undoubtedly so, where a judgment is sought to be revised on that ground. *Naughton v. Dinkgrave*, 533.
6. In this case a devolutive instead of a suspensive appeal was taken, and while the court below had lost jurisdiction of the case by reason of the appeal, the appellant obtained an injunction to restrain the execution of the judgment on the ground of the insufficiency of the proof on which the order of seizure and sale had been rendered. Whether or not the evidence was sufficient, was a question for this court to decide in revising the appeal from the order of seizure and sale, and which the district judge had no right to determine in an injunction proceeding. *Ibid.*

SEE APPEAL, No. 42—*Jennings v. McConnico*, 651.

SEE JUDGMENT, No. 10—*Pierce v. Clark*, 111.

STATE WARRANTS.

SEE OFFICE AND OFFICERS, Nos. 14, 15—*State ex rel. Strauss v. Dubuclet*, 161.

SEE TAXES AND TAXATION, No. 19—*State v. Lemarié*, 412.

SERVITUDE.

1. Servitudes, when an act of sale is silent on the subject, can only be shown by proof of the use or existence thereof for a period sufficient to establish title, and this may be proved by parol. All agreements in relation to such use may also be proved by parol, unless it is shown that they were reduced to writing.

Machea v. Avegno, 55.

2. The evidence in this case shows that the alleged servitudes were subject to the will of the owner of the property on which they were exercised, and that the owner or owners of the other property in whose behalf said servitudes were claimed to be established never acquired any legal title thereto.

Ibid.

SURETY.

1. The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale, article 689 Code of Practice.

Michel v. Kaiser et al., 57.

2. As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety.

Lepretre v. Barthet, 124.

3. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond, or release the surety. *Ibid.*

4. An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the terms of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents which do not come within the purview of their powers, and which are therefore not regarded as binding on their principals. Therefore the defendants' plea in this case that they are not bound as sureties on the notes sued upon, for the reason that the plaintiff gave an extension of time to the principals without their knowledge and consent, is not well founded.

Landry v. Delas, et al., 181.

SURETY—Continued.

5. If the appellant, when called on, does not adduce proof affirmatively to show that his surety is good, and no evidence to impeach him is offered, it is now the jurisprudence of this court that the judge *a quo* can not pronounce him to be insufficient and order execution to issue. Some proof is necessary to destroy the presumption of sufficiency arising from the acceptance of the bond, with the surety signing it

State ex rel. Hays v. Judge of the Fifth District Court, parish of Orleans, 616.

SEE APPFAL, No. 40—*State ex rel. Silverstein v. Judge of the Fifth District Court, parish of Orleans*, 622.

SEE BONDS.

SEE PRESCRIPTION, Nos. 8, 9—*Hugh v. Hernandez*, 360.

SEE JURISDICTION, No. 6—*Larue v. Vanhorn*, 445.

SEE EXECUTOR AND ADMINISTRATOR, Nos. 11, 12—*Succession of Leontine Guilbeau*, 474.

SLAVES.

SEE JUDGMENT, No. 18—*Bruin v. Sasser*, 224.

No. 19—*Consolidated Association of the Planters of Louisiana v. Blanc*, 226.

Nos. 27, 28—*Lindstrum v. Ewing*, 520.

No. 35—*Winter v. Tounoir et al.*, 611.

SEE MARRAIGE, Nos. 17, 18—*Pierre v. Fontenette*, 617.

SEE BILLS AND PROMISSORY NOTES, No. 21—*Duperier v. Darby*.
No. 9—*Poydras v. Poydras*, 405.

SEE SHERIFF, No. 5—*Hall & Co. v. Chacheré*.

SHERIFF AND SHERIFF'S SALES.

1. The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale. Art. 689 Code of Practice.

Michel v. Kaiser et al., 57.

2. There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court.

Blair & Co. v. Tayler et al., 144.

3. A release in case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety, defendant on the bond. As a public officer, the sheriff has

SHERIFF AND SHERIFF'S SALES—Continued.

not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation.

Urquhart v. Carvin, 218.

- 4 Where a motion was made to quash the panel of the jurors, on the ground that the Criminal Sheriff has no legal right to furnish a list of persons liable to jury duty, keep the same in the Criminal Court, and array juries therefrom, because said list should be furnished by the sheriff for the civil courts, in conformity with section 2144 R. S., which says: "It shall be the duty of the sheriff of the parish of Orleans, in the month of December, to furnish a list of all persons liable to jury duty residing within the limits of the parish of Orleans:" Held—That the sheriff for the Criminal Court is a sheriff of the parish of Orleans, as much as the sheriff for the civil courts, and the constitution makes him the executive officer of the Criminal Court. It is his duty, as such executive officer, to perform the duty imposed by the above law and section 2147 R. S. He is specially and solely the executive officer of that court.

State v. Burns, 302.

5. The plea that a part of the price bid at the sheriff's sale was for slaves contrarily to the jurisprudence of this State, can not be allowed when, to all intents and purposes, the sheriff's sale has become an executed contract, and the contest between the parties relates only to the distribution of the price.

Hall et al. v. Chachere et al., 493.

6. When there was no law authorizing the sheriff to advertise and sell, as he did, the cotton plantation of the plaintiff under the judgment of the defendants, in lots of from ten to fifty acres, disregarding the plaintiff's notice that he desired it sold in block and not according to the advertisement; and where, in defense of his act, the sheriff contended that, before the day of sale, he had notified the plaintiff to inform him whether he desired the property thus advertised to be sold in lots or in block, and that plaintiff, having refused to give any instructions, had no cause to complain: Held—That in forced sales the forms of law must be strictly complied with, and that, in this case the defect in the sheriff's proceedings could not be cured in the manner attempted by him.

Morrison v. Flournoy, 545.

7. Property advertised to be sold in lots of from ten to fifty acres could not be legally sold in block, and the plaintiff, at this stage of the proceedings, was not bound to give any directions to the sheriff, or to give any consent to the manner of selling his property. He had the right to require a legal advertisement, and was not bound to waive it by giving instructions to the sheriff concerning the sale.

Ibid.

SEE CRIMINAL LAW AND PRACTICE.

SEE EVIDENCE, No. 27.—*Mouton v. Broussard*, 497.

SECRETARY OF STATE.

SEE CONSTITUTION AND CONSTITUTIONAL LAW, Nos. 15, 16, 17, 18—*Whited v. Lewis*, 568.

STATE COMMISSIONERS.

1. It was clearly the purpose of the Legislature, by the act of 1840, enlarging the powers of commissioners for the State residing in other States, to confer upon them the usual powers and functions belonging to notaries by the laws of this State.

Puckett v. Law, 595.

SALES.

1. The purchaser at a judicial sale is protected by the decree ordering the sale, and is not bound to look beyond it.

Succession of Penniger, 53.

2. The services of special tutors *ad hoc* are not necessary to effect a sale of minors property.

Ibid.

3. The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale. Article 689, Code of Practice.

Michel v. Kaiser et al., 57.

4. Where it was alleged, in opposition to the claim of a necessitous widow, that the adjudication of a debtor's property to himself, created the vendor's privilege to secure the twelve months bond which he gave: Held—That an adjudication of this character does not create the vendor's privilege, because it does not transfer the ownership of the property, nor change the nature of the title and possession; that it neither satisfies the judgment, nor novates the debt; that it is not strictly a sale, but only a means by which a creditor acquires additional security for his debt.

Succession of Heitzler, 116.

5. Where the plaintiff's mortgage was in existence at the time of the sheriff's sale, and the mortgaged property was adjudicated to him, he had the right to retain the purchase money up to the amount of his debt, and the title to the property should have been made to him.

Blair & Co. v. Taylor et al., 144.

6. Where A had the right to sell the share she claimed to have in a piece of property, it is immaterial to inquire whether she owned any portion of said property. Having sold the whole of it and received the price thereof, she was bound to complete the title, and the moment she acquired the same, it inured to and vested in her vendees. Their title became as complete as if she had executed to them a deed immediately after she had acquired said property. Her reconveyance of it to him from whom she had purchased it, passed no title. It was the sale of another's property, and therefore a nullity.

Crocker et al v. Hoag et al., 159.

SALES—Continued.

7. The third opponent, having claimed part of the proceeds, has no right to demand that the sale be treated as an absolute nullity. Besides, it could only be set aside in a direct action.

City of Baltimore v. Parlange, 335.

8. A vendor can not contest his own acts. On the contrary, he is bound to warrant their legality. If the defendant in this case had title to the whole of the property she caused to be sold, her title was divested by the sale which she provoked, and the interest she acquired in it as one of the purchasers thereof is only the interest of a coproprietor. This interest is joint, and her right to the possession, use and enjoyment thereof is also joint, not exclusive.

Littell v. Wackerhagen, 529.

SEE SHERIFF AND SHERIFF'S SALES, Nos. 6, 7—*Morrison v. Flourney, 545.*

SEE JUDGMENT, Nos. 25, 26—*McWaters v. Smith, 515.*

STOCKHOLDERS AND STOCKS.

1. On a motion to dismiss an appeal on the ground that the matter in dispute does not exceed five hundred dollars, the amount of defendant's liabilities on a stock note as stockholder in a company will determine the jurisdiction of the court and not the percentage claimed thereon. It must be first ascertained if he is liable on the stock note itself, as alleged in the petition.

Peychaud v. Weber, 133.

2. A stockholder can not, when sued, call into question the name borne by a company and mentioned in his stock note at the time it was given, and it rests with him to show that the contribution called for is not needed.

Ibid.

3. There seeming to be no special denial of defendants in this case, of their obligation to issue certificates of stock to the owners thereof, the proceeding by mandamus is authorized to compel them to do so, if the ownership is not disputed.

State ex rel. Philips v. New Orleans Gas Light Company, 413.

4. The loss of plaintiff's certificates and the advertisement thereof being sufficiently established, the defendants can not refuse to issue new certificates on the ground that a bond of indemnity is not furnished. There is no good reason for requiring such a bond. The stock can not be transferred by relator except upon the books of the respondent and on the production of the certificates. This is sufficient protection to the company.

Ibid.

5. Where the question was as to the validity of the transfer of stock, on the ground that it was not made in accordance with the formalities required by the charter of the company: Held—That if the consent of the directors to the transfer was not obtained in a formal convocation of the board, yet the assent of a majority of the directors appeared to have been given and in the manner that transfers of stock were frequently made. This is sufficient.

Ellison et al. v. Schneider et al., 435.

SUBROGATION.

1. Where A is a solidary obligor with B, by paying the note he becomes legally subrogated, for the amount of one-half thereof, to the entire obligation of B to the original holder. This subrogation extends as well to the accessory as to the principal obligation, and the subrogee acquires all the remedies as well as all the rights of the party to whom he was subrogated. Without the remedy of seizure and sale the subrogation would be incomplete. A was not a mere transferee who could not proceed *via executiva* without an act of subrogation. He was legally subrogated, and as such was thoroughly invested with all the rights of the original holder or payee, as if the same had passed to him by a regular act of conventional subrogation. *Durac v. Ferrari*, 80.
2. Where it appeared that A borrowed a certain sum of money from B, with the avowed intention of discharging notes given to C, and with subrogation of C's rights of mortgage, but C was not a party to this act: Held—That A had no authority in law to subrogate B to C's rights without C's knowledge or consent.

Hoyle v. Cazabat, 433.

SEE JUDGMENT, No. 5—*Mississippi and Mexican Gulf Ship Canal Company v. Noyes et al.*, 62.

SHIPPING.

1. The attempt to make the seller and shipper responsible for the loss of the goods shipped must fail, where he had no instructions or authority to insure said goods, and the evidence does not show that this was incumbent upon him by the custom at the place of shipment. *Hanan & Richards v. Bowles*, 453.

SEE CARRIERS.

TUTORS AND TUTORSHIP.

1. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix were not absolute nullities, and can not be attacked collaterally. Where a divorced wife marries again, and after the death of her first husband, claims to exercise her rights of tutorship by nature over the issue of her first marriage: Held—That the forfeiture announced in article 254 of the Revised Code has no application to her case. *Succession of Pinniger*, 53.
2. There is no law prohibiting a divorced wife from becoming natural tutrix of her children after the death of their father. *Ibid.*
3. The fact that there are no special tutors *ad hoc* appointed for minors at the time of the sale of their property does not concern the purchaser. *Ibid.*
4. The services of special tutors *ad hoc* are not necessary to effect a sale of minors' property. Their duty begins at the partition before the notary; if not appointed at the time of the sale, they

TUTORS AND TUTORSHIP—Continued.

may be appointed afterwards and before the notary begins the partition. *Ibid.*

5. Where it might be true that, technically, a widow had never qualified as administratrix of her husband's succession, yet where she qualified as tutrix to her minor children, she necessarily became administratrix of his succession, and payment to her as such of a debt due to the succession would be valid.

Locke v. Barrow, 118.

6. Where the creditors of a succession opposed the final account of the administratrix of said succession on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid: Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiæ*. The administratrix should not have omitted to place the claim of the opponents on her final account and to provide for its payment, because the process of garnishment had been resorted to against one of the opponents by a third party.

Succession of Neal, 125.

7. Where a note for a certain sum of money was found in the succession of the father of the maker's wife, and was alleged to have been given in acknowledgment of an *avancement d'hoirie* to said wife, who subsequently died, leaving minors for her heirs: Held—That said note being given in the individual name of the maker must be considered as his individual debt, and is not subject to collation on the part of the minors in the succession of their grandfather, and that, even admitting said note to have been an acknowledgment of indebtedness by the drawer in the name of his children, a tutor has no right to make such an acknowledgment.

Succession of Landry v. Peray, 183.

8. Where A was appointed by will tutor to minors, and at the same time the testator declared that the care, management and raising of his children should be left in the hands of Miss B: Held—That this was not appointing her tutrix; that this was merely giving her the personal care of the children, whilst the legal control of the persons and property of the minors was vested in A, who could as tutor, when he chose, remove them from her care.

Succession of Payne, 202.

9. On the plea that a tutrix can not authorize another person to bind the minors on an injunction bond: Held—That it is the duty of a

TUTORS AND TUTORSHIP—Continued.

tutrix to protect the rights of her wards, and if, in the accomplishment of that duty, it becomes necessary to execute a judicial bond, she has the right to do so. *Dupré v. Swafford*, 222.

10. Nothing is to be found in the statutes of this State relative to adoption, which, being construed with the various articles of the Civil Code on the subject of tutorship, inclines this court to believe that the Legislature, in permitting the adoption of children, had any intention to abridge the right of a natural tutor to the personal care and control of his minor child or to the administration of the child's property. *Succession of Forstall*, 430.
11. The defense that the note sued on was given in settlement of the claim of the plaintiff against defendant as tutor, when no account had been rendered by defendant to the court, can not be sustained. *Neilson v. Neilson*, 528.
12. The provision of the Code, which requires a tutor to render an account ten days previous to entering into any agreements with his ward, is intended for the protection of the ward, and he alone can take advantage of its disregard. The tutor can not take advantage of his failure to comply with the law. *Ibid.*
13. The allegation that the note was given for two slaves purchased at the tutor's sale of the minor's property, can not be listened to in a court of justice. The tutor can not, in his own defense, be permitted to urge his own dereliction of duty and violation of the laws of his country. Besides, it is in evidence that the price of the slaves was not the consideration of the note sued on. *Ibid.*
14. The execution of the note for the amount ascertained to be due by the tutor did not change the character of the debt. It fixed the amount due and the period when it should be exigible, but it did not extinguish the legal mortgage which the law gave to secure the rights of the ward. Novation is never presumed.

Ibid.

SEE JURISDICTION. Nos. 9, 10—*Lay v. Succession of O'Neil*, 603.

SEE JUDGMENT, Nos. 33, 34, 35—*Winter v. Lounoir et al.*, 611.

TRANSFER.

SEE BILLS AND NOTES—*City of New Orleans v. Strauss*, 50.

SEE MINORS, No. 1—*Seyburn v. Deyris*, 483.

TRESPASS.

SEE PRESCRIPTION, No. 11—*Whitehead v. Dugan*, 409.

TELEGRAPH COMPANY.

SEE PRESCRIPTION, No. 10—*Lagrange v. Southwestern Telegraph Company*, 383.

SEE CARRIERS, Nos. 2, 3, 4—*Ibid.*

TRUSTS.

1. Where defendants received a certain quantity of cotton, sold it, and collected the proceeds of the sale as commission merchants or factors of the plaintiff: Held—That the debt resulting from it is a fiduciary one, and exempted by the insolvent law from its operation. The money was received in trust for the plaintiff. Defendants, by converting it to their own use, rendered themselves amenable to the criminal laws of the State. It can not, therefore, be inferred that the insolvent laws of the State intended to discharge a debtor from such a debt, even if it had not been therein expressly excepted. *Tate v. Laforest*, 187.

TAXES AND TAXATION AND TAX SALES.

1. The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former. *State v. Doherty*, 119.
2. Where the resistance to the payment of State taxes was founded on the ground that the clerk, sheriff and recorder, before proceeding to make the assessment on which the tax is levied, gave no notice in the official journal of the parish, as required by section forty of the Revenue law, acts of 1871, 116: Held—That the plaintiff's objection rested merely on technical grounds, inasmuch as he had paid voluntarily his parish taxes, which were levied under the same law, by the same parties, upon the same assessment, at the same time and in the same manner in every respect as the State taxes, and had several times promised to pay said taxes; and inasmuch also as he had made in this proceeding no complaint of any error, injury, or injustice in the assessment and levying of the taxes. *Gag v. Hebert*, 196.
3. The object of section forty of the Revenue law of 1871 is to give the taxpayer notice, that he may have an opportunity to have errors corrected and a just assessment made. Where it is proved that he had such notice, he has no cause to complain. *Ibid.*
4. There is no prohibition in the constitution against the sale of property for taxes in lots of from ten to fifty acres, or any other quantity. The fact that the constitution directs that all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres, does not inhibit the legislature from directing lands sold under other process to be similarly divided. *Ibid.*
5. The impracticability of the proceeding prescribed by law and the imposing of the cost thereof upon the purchaser of lands sold for taxes, are not good grounds for an injunction on the part of the

TAXES AND TAXATION AND TAX SALES—Continued.

taxpayer. The consequences referred to will rest with the State and the purchaser. *Ibid.*

6. Where a piece of property was bought at a tax sale, the deed for it made out by the sheriff and duly recorded in the office of the recorder of the parish, and said property was seized by a creditor of its former owners, who treated the tax sale as an absolute nullity, and who, being enjoined by said purchaser, proposed in the injunction suit to attack the title by showing irregularities and defects in the proceedings preceding the tax sale: Held—That on its face the title of the purchaser is regular; that he is in possession under a recorded title; that by a special provision of the constitution, article 118, the deed of sale is *prima facie* evidence as to the title; that it is declared valid by section 59 of the act of 1872, No. 42, and that for these reasons the injunction must be maintained. *Coco v. Thieneman et al.*, 236.

7. Where the plaintiff sued for the value of his services in transferring from the other district courts and docketing in the Superior District Court some fifteen hundred tax suits, and obtained judgment in his favor for the sum of fifty cents per suit on all of said suits: Held—That the extra compensation allowed the clerk in this instance was not authorized by law.

Burk v. City of New Orleans, 301.

8. Where, instead of procuring and recording, according to law, certified copies of judgments as directed by city ordinance No. 1630, administration series, the plaintiff followed the provisions in section 12 of act No. 73 of 1872, by which a special mode was provided for recording the taxes due to the city without any cost to the city: Held—That if the provisions of this act are resorted to in preparing and inscribing the tax judgments to preserve the lien and mortgage in favor of the city, its provisions in regard to compensation must be enforced. It is only by the terms of this law that the lists or registers prepared by the plaintiff can have effect as a legal inscription. But this inscription was to be made without cost to the city. Outside of this law the said registers or inscriptions of judgments, as made by plaintiff, are without effect. The inscriptions are not made in the books of privileges and mortgages required by the general law on the subject.

Southworth v. City of New Orleans, 333.

9. The clerks of courts in the city of New Orleans do not come within the provisions of section 52 of act No. 42 of the General Assembly of 1871 in relation to the assessment and collection of taxes.

State ex rel. Lynne v. Clinton, 342.

10. There is no law which requires that the tax bills or receipts shall

TAXES AND TAXATION AND TAX SALES—Continued.

be signed by the Administrator of Finance of the city of New Orleans, or that stamps should be affixed to them.

City of New Orleans v. Crescent Mutual Insurance Company, 390.

11. It is not necessary that, in the judgment enforcing the payment of the tax bills, there should be specifications separating the amount assessed on real estate from the assessment on merchandise, capital and money at interest. It is sufficient that this should be done in the tax bills on which the judgment is predicated. *Ibid.*
12. It was a sufficient publication, and such as was required by the law, where it was proved that the notices to taxpayers were published at least four times in the New Orleans Republican, to wit: on the twenty-second, twenty-seventh and thirtieth of August, and on the nineteenth of September, 1872. It was not necessary that there should have been further evidence of the ordinances Nos. 1497 and 1498, than there is in the record. *Ibid.*
13. The offering in evidence of the several papers in which the notice of publication was made, and the subsequent filing of them, was sufficient to establish what the law required. *Ibid.*
14. The law relating to city taxes does not require the notices to be published for thirty days. It only declares that no judgment shall be rendered until after thirty days' notice, the notice to be thrice published. *Ibid.*
15. The city ordinances Nos. 1261, 1262, 1272, of December, 1871, do not make the aggregate taxation exceed two per cent., and this objection, so far as these ordinances are concerned, can not be maintained. *Ibid.*
16. The city ordinance of the nineteenth December, 1871, and the ordinance of the thirtieth December of the same year, are not in violation of the act of the sixteenth of March, 1870, section 18, which provides that the Common Council of New Orleans shall, once at a regular meeting in the month of December, and not oftener, in each and every year, lay an equal and uniform tax, etc. *Ibid.*
17. The ordinance of the City Council, seventh May, 1872, levying a third tax in addition to those levied by the ordinances of the nineteenth and thirtieth December, 1871, is not contrary to the statute which provides that taxes shall only be levied once a year in the month of December, because said ordinance rests on the act of the twenty-fourth April, 1872, which authorizes the levying of said tax on an estimate to be made from the tax rolls of 1871. The objection that this act is unconstitutional because retrospective in its effect can not be maintained. *Ibid.*
18. The constructing of levees for the protection of lands subject to overflows is not made at the expense of the State treasury. That

TAXES AND TAXATION AND TAX SALES—Continued.

expense is met by a general tax on all the taxable property of the people of the State. The Legislature had the power to impose that tax and to appropriate it as they saw fit. They create no debt which goes beyond the constitutional limitation, and in the acts referring to the general levee tax have violated no provision of the constitution.

State ex rel. Louisiana Levee Company v. Olinton, 401.

19. Where the defendant being sued as a defaulting tax collector, his defense was that the State Treasurer illegally refused to receive from him certain State warrants which he alleged he took in payment of taxes: Held—That the defense was not tenable, because at the time the warrants were tendered the Treasurer was enjoined by the Superior District Court from receiving the same, and because said warrants were illegally issued, no appropriation for such purpose having been made as required by article 104 of the constitution, and because the defendant did not, in relation to those warrants, comply with the provisions of section 3337, Revised Statutes.

State v. Lemarié, 412.

20. Unless the property within an incorporated town is expressly exempted by law from a parish tax, the general power conferred on the police jury of the parish to assess a tax on all ordinary objects of taxation in the parish will reach such property.

Maurin v. Smith, 445.

21. This case is held by the court to be governed by the one of *Campbell v. the City of New Orleans*, 12 An. 34. There is but one difference in point of fact. Campbell paid his taxes without objection or protest, and sought only to recover the amount back after it had been decided in a controversy between another party and the city, that the ordinance under which the assessment was made was unconstitutional. In the present case, the plaintiffs, before making their last payment for taxes, expressly stipulated with the City Treasurer, to whom their money was paid, that it should be returned in case there should be rendered a decision in a certain sense, by the court, in another pending controversy. But they paid, not because they were compelled to pay, but because they chose to pay, and, on the contrary, did not resist payment, as was done in the case upon the decision of which they were content to rest their case.

Factors and Traders' Insurance Co. v. City of New Orleans, 454.

22. The stipulation by plaintiffs with the City Treasurer amounted to nothing, for it was not shown that he had authority to make the contract.

Ibid.

23. There was an unquestionable, natural obligation on the part of plaintiffs to bear their quota of the expenses of carrying on the

TAXES AND TAXATION AND TAX SALES—Continued.

municipal government of the city of New Orleans. The plaintiffs have enjoyed all the advantages and protection of that municipal government. To return to them the money which they have paid in consideration of these advantages, would be to give them the protection which they required for their persons and property, and make their fellow citizens pay for it. *Ibid.*

24. The law under which plaintiffs paid their taxes was in full force and vigor at the time. It is a fallacy to contend that it never had any life because it was unconstitutional. *Ibid.*

25. Where plaintiff, whose property, as he claimed, was seized by virtue of a judgment in the suit of *Marcy v. McKinney*, enjoined said execution and excepted to the right of defendants and intervenor to thus attack his title collaterally, but averred that they must do so by a direct revocatory action contradictorily with all the parties to the tax sales at which he acquired the property, and further excepted that they had neither alleged nor suffered any injury by said sales: Held—That the court *a qua* erred in maintaining the exceptions of plaintiff to the right of the intervenor and defendants to contest the validity of the tax sales under which plaintiff holds. *Dupre v. Thompson*, 503.

26. Section 11 of act 81 of the regular session of 1872, promulgated on thirteenth April, 1873, does not violate, as alleged, the uniformity and equality of taxation, because it exempts some property and persons in the town of Monroe, within the limits of the parish of Ouachita, from taxation to which other inhabitants of the parish are subject, and because the Legislature can only exempt "property actually used for church, school and charitable purposes." *Whited v. Lewis*, 568.

27. The power to tax property within the parish of Ouachita and require licenses from the inhabitants thereof, was conferred by the Legislature on the police jury, and the exercise of that power is only curtailed by the section of the law which exempts the town of Monroe. *Ibid.*

28. The Legislature conferred the power of taxation on each subdivision of the local government—the police jury of the parish and the municipal authorities of the town of Monroe—and had the right to withdraw or modify that delegation as to each or both. The act was not retroactive. It merely withdrew a delegated power which had not yet been exhausted, and destroyed no vested right in the police jury. *Ibid.*

29. The tenth clause of section 1 of act No. 14 of the acts of 1872 is not unconstitutional, because it levies a tax of eighty-five dollars on persons dealing in distilled liquor, or retailing spirituous liquors on land, while a tax of only fifty dollars is levied on persons fol-

TAXES AND TAXATION AND TAX SALES—Continued.

lowing a like occupation on steamboats, although they may only ply within the limits of a single parish of the State.

Kaliski v. Grady, 576.

30. Retail dealers are those who keep an open shop and who sell provisions and liquors in small quantities. C. C. 3208. A wholesale dealer is a person who sells by packages. A man may be both a wholesale and retail dealer. He is a wholesale dealer when he sells parcels of goods in packages, as, for instance, ten barrels of flour or whiskey, or whiskey and flour by the barrel, or one or more sacks of coffee, or bolts of goods, at the same time, and to the same party. He is a retail dealer when he sells flour by the pound, whiskey by the gallon or bottle, dry goods by the yard. He is both a wholesale and retail dealer when he sells all such articles by the package or by the pound indifferently.

Flournoy & Millsaps v. Grady, 591.

31. Each proviso, the one in section 15 of act No. 42, approved March 3, 1871, and the other in section 15 of act No. 14, approved March, 5, 1872, refers simply to the license tax, and not to taxation on the property, capital, etc., of insurance companies.

City of New Orleans v. Salamander Insurance Company, 650.

32. Under the act of 1871, the payment of \$1000 as a license, and of one per centum on the premiums earned from policies issued through agencies in the State, in addition to said license, will exempt the company from any other license for doing business, throughout or in any part of the State—the one per centum being considered sufficient from the agencies in the State, and the \$1000 from the mother company. *Ibid.*
33. The act of 1872 treats only of the subject of licenses, and is limited to that only. *Ibid.*

SEE CONSTITUTION AND CONSTITUTIONAL LAW, Nos. 20, 21, 22—

State ex rel. Blakemore v. Graham, 625.

WARRANTY.

1. Where a certificate of indebtedness, with the date and number wanting, was stolen, while being prepared for issuance, before it was issued and put in the market by the city of New Orleans, and after the date and number had been subsequently forged was sold to the defendant, who called his vendor in warranty: Held—That this instrument can not be classed as negotiable paper upon which the maker is bound to innocent holders. It is transferable, it is true, but the transferee obtains only the rights of the transferrer.

City of New Orleans v. Strauss, 50.

2. In this case the transferrers and warrantors had no legal possession of the certificate of indebtedness of which the city of New Orleans never ceased to be the owner. *Ibid.*
3. There is no ground for a call in warranty in a case of trespass, and hence there is no right of action against warrantors.

Coco v. Hardie, 230.

WAGES.

SEE PRIVILEGE, No. 6—*Radowitch v. Siewerd*, 315.

WITNESS.

1. Where the objection to the validity of a will was, that the person who wrote and read it was not designated therein as a witness, but as a notary: Held—That there is no law which declares that a man, because he is a notary public, is not a good witness to a will, and there can be seen no reason why he should not be. *Succession of Payne*, 202.

SEE CRIMINAL LAW AND PRACTICE, No. 18—*State v. Prudhomme*, 522.

WALLS IN COMMON.

1. Where defendant was sued for half the value of a wall, which said defendant made a wall in common by using it to support his buildings: Held—That he had no interest to question plaintiff's title further than to ascertain whether the claim demanded could safely be paid to the claimant. *Irwin v. Peterson*, 300.
2. The question whether the relator in this case had, as owner of an urban lot of ground, the right to build a wall or fence on her own property for her own profit and convenience, involves a larger interest than the five hundred dollars damages claimed by her next neighbor as resulting from the erection of said wall or fence, and therefore a suspensive appeal lies to this court from a judgment rendered against relator. It is a question concerning the ownership of property and its enjoyment, and may involve the entire value of the property on which the wall or fence is built.

State ex rel. D'Arcy v. Judge of the Fourth District Court, parish of Orleans, 621.

WILLS AND TESTAMENTS.

1. The subject matter of this suit is purely probate in its character, to wit: the revocation of the probate of a will, and the suit was properly brought, under the circumstances of the case, in the probate court which had made the order to record and execute the will. *Fuentes v. Gaines*, 85.
2. An *ex parte* order admitting a will to probate is not a judgment binding upon those who are not parties to the proceeding. The *ex parte* order for the recording and execution of the will is a preliminary proceeding for the administration of an estate, if not a final judgment which concludes every one. It is a mere license to authorize the executor or heir to carry out the provisions of the testament; and the verity and validity of the will must be established whenever questioned by third persons from whom property is judicially demanded under the will. *Ibid.*
3. Article 3542, Civil Code, refers to actions for the nullity of testaments when the instituted heir is in possession of property under

WILLS AND TESTAMENTS—Continued,

the will, and is sued by the heirs at law to annul the will and to take from the instituted heir the property. It does not apply to a case in which the defendant in a chancery suit is obliged to come to the probate court to establish a part of his defense in consequence of the limited jurisdiction of the Circuit Court of the United States. *Ibid.*

4. The validity of a probated will is immaterial to third parties until they are disturbed under it in the possession of their property, and prescription against them could not begin to run until the cause of action had arisen; nor can prescription run against one in possession. *Ibid.*
5. Where a will, when last seen, was in the possession of the testator, and it could not be found at his death, the presumption of the law in such a case is, that the testator destroyed it *animo cancellandi*, and the *onus* of rebutting this presumption is cast upon those seeking to establish the will. The opinions or suspicions of a witness can not overcome the presumption raised that the testator himself destroyed the will. *Ibid.*
6. The contents of a lost will can not be proved by witnesses who derived their knowledge from the verbal declarations of the testator. It would practically authorize the making of a verbal testament, and a lost testament could thus be proved by evidence which would be incompetent to prove the will if produced in court. *Ibid.*
7. It is necessary to prove that a lost olographic will contains all the essentials prescribed by law before it can be admitted to probate, to wit: That it was wholly written, dated and signed by the testator, and the witnesses must state the facts which are necessary to enable the court to determine whether or not the will is valid. *Ibid.*
8. It is essential to specify the day, month and year to give a date to a testament in the sense of article 1588 of the Civil Code. *Ibid.*
9. The facts required to be established by article 1655 Civil Code for the probating of an olographic will must be proved by competent testimony, and can not be inferred by the court. *Ibid.*
10. Where plaintiff was not an heir: Held—That she had no right to attack a will in so far as it related to the disposal made by the testator of his property, but that she might sue to annul it in so far as it interfered with her rights to have the tutorship of her grand children. *Succession of Payne, 202.*
11. It is unnecessary to decide the question raised whether a testament is valid as a will by nuncupative public act, when it is good as a nuncupative will under private signature. *Ibid.*
12. Where the objection to the validity of such a will was, that the

WILLS AND TESTAMENTS—Continued.

person who wrote and read it was not designated therein as a witness, but as a notary: Held—That there is no law which declares that a man, because he is a notary public, is not a good witness to a will; and there can be seen no reason why he should not be. *Ibid.*

13. A will can be set aside only when the law itself pronounces it to be null on account of the want of compliance with those formalities which are declared to be sacramental. *Ibid.*

14. Where A was appointed by will tutor to minors, and at the same time the testator declared that the care, management and raising of his children should be left in the hands of Miss B: Held—That this was not appointing her tutrix; that this was merely giving her the personal care of the children, whilst the legal control of the persons and property of the minors was vested in A, who could as tutor, when he chose, remove them from her care. *Ibid.*

15. In 1860, Manette Dubreuil died. Her estate consisted of the undivided half of a certain real estate, standing in the name of Charles Beebe, deceased. Manette Dubreuil had no legal heirs. Luke Beebe was her natural son, duly acknowledged and recognized as such by a judgment of the Second District Court of the parish of Orleans. In 1870, said Luke Beebe got judgment in his favor against the executor of Charles Beebe to recover one-half of said property. In 1871, the children of a predeceased natural child of Manette Dubreuil caused her will to be probated. These grandchildren and Luke Beebe were by said will made universal legatees; and the testatrix further declared that she acknowledged owing her son Luke a certain sum of money he had advanced to her for her benefit, and which she wished to be paid to him, with a certain rate of interest. The grandchildren and universal legatees, who are the contestants in this case against Luke, maintained that the passage of the testament above referred to was only the acknowledgment of a debt and not a legacy, and pleaded prescription: Held—That it constituted a remunerative legacy; that the succession of Manette Dubreuil was an irregular succession; that representation is not admitted in such successions, except in the case of the succession for a natural child; that until the will of Manette Dubreuil was probated, Luke Beebe was the sole heir of the deceased; that, as such, he had no right to sue the estate, or to make a demand for payment of a debt due to him, as such debts are extinguished by confusion; that when the will was produced and probated, Luke Beebe ceased to be the sole heir; that his right as creditor became exigible, and that until then prescription did not begin to run.

Succession of Manette Dubreuil, 370.

WILLS AND TESTAMENTS—Continued.

16. The argument that a testamentary disposition in favor of Mason county court, Kentucky, is immoral, and therefore null, because the legacy is to be applied to the support of indigent illegitimate children under seven years, and their indigent mothers, is not considered worthy of serious consideration.

Succession of Milton Taylor, 446.

17. Where the formalities required by Art. 1578 Revised Code, were not complied with, a will is not good as a nuncupative testament by public act, nor can it be held good as a nuncupative will by private act, when the proof adduced fails to show that the formalities required for it have been observed.

Thibodeaux v. Voorhies, 478.

18. Where a will was made in these terms: "At home, March 4, 1870. I this day make my will. I want my wife to keep and maneg all my estate both reil and persnel deuren her lif time and be Lowed to sell eny of the land for not less than the apprsment and I apoint my wife administrater: Held—That said will contains no substitution and no *fidei commissum*, which are never to be presumed; that the words of a will, like those of a law, are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words; that said will, construed by these rules, means that the testator intended to give the usufruct of his estate to his wife, and is valid.

Hasley et al. v. Hasley, 602.

19. Express mention must be made in the nuncupative will by public act that the witnesses were present at the time it was received by the notary and dictated by the testator, otherwise the instrument does not conform to the requirements of article 1578 of the Revised Code, and is therefore void.

Conner v. Brasher, 683.

20. That the witnesses came with the testator to the office of the notary and were present when the will was read to him, is not sufficient. This might be strictly true, and yet the witnesses might not be present at the dictating and writing of the testament. *Ibid.*

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